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Abstract

PUBLISHED IN ABSTRACT

Joseph C. Gould, Plaintiff-Appellee, v. Ross C. Swartz,  
Defendant-Appellant.

*Appeal from Circuit Court, DeWitt County.*

Gen. No. 9192

303 I.A. 15

MR. JUSTICE RIESS delivered the opinion of the Court.

A judgment in favor of the plaintiff appellee, Joseph C. Gould, was recovered before a Justice of the Peace in DeWitt County, Illinois, against Ross C. Swartz, defendant appellant, in the sum of \$245.00 and costs of suit, from which an appeal was taken to the Circuit Court of that county and the cause was there tried de novo by the Court without a jury, resulting in a similar judgment, from which an appeal was taken by the defendant to this Court.

Both Plaintiff Gould and Defendant Swartz were licensed real estate brokers with offices in Farmer City, where they had carried on their respective businesses for profit for a number of years. On several occasions they had operated together for the purpose of procuring and selling tracts of real estate. In two specific transactions they had failed to make such sales, and on two other occasions they had been successful and had divided the commissions accruing from such sales. In one instance, mentioned as the sale of the Mullen farm, a commission of \$800.00 was paid and divided between them on the basis of \$400.00 to each. In another sale of land to one Rev. George Thorpe, in which they so cooperated, Gould received a commission from Swartz of \$100.00, and testified that he believed it to be one half of the commission paid. Swartz, who also testified did not state the basis of this division.

Subsequently, in the latter part of the summer or fall of 1932, Gould became acquainted with a Mr. Zimmerman, who was a prospective purchaser of a farm. Gould showed him some farms which he had listed for sale, but they were not satisfactory to Zimmerman. Gould asked Zimmerman if he would meet Swartz, who also had some farms listed, and stated that they were working together and could show him the Swartz farms, to which arrangement Zimmerman assented. Gould then went to Swartz and told him of this pro-



spective buyer and went with Swartz out to Zimmerman's home and introduced them. Swartz and Gould then took Zimmerman to see the Roth farm, but could not close the deal because it required payment in full of the purchase price in cash. Gould and Swartz then showed Zimmerman different farms that Swartz had listed and each of them also showed Zimmerman other farms listed by Swartz, but no deal was closed during that fall and winter.

It further appears that from February to August no farms were shown to Zimmerman, but in August Swartz showed Zimmerman the Ratliff ninety-eight acre farm, which he purchased, and on which a commission of five dollars per acre or \$490.00 was paid. Swartz divided this commission with his partner, Rinehart, but paid nothing to Gould, and suit was thereupon instituted, which resulted in a judgment for recovery of one-half of the commission as above indicated. With the decision of the Trial Court a written opinion was filed, a copy of which appears in Appellant's abstract.

Plaintiff below contends in his brief that an implied contract for the payment of one half of the commission to him for having procured the above purchaser exists on the same basis as he contends previous settlements on sales were made between the parties. No express contract was made in any of the sales between Gould and Swartz, but their joint operations were recognized and commissions were divided as indicated in previous sales.

Defendant Swartz denied the existence of any express or implied contract, contended that the lapse of time between the day the last farm listed by him had been shown to Zimmerman in February by Swartz and Gould resulted in an abandonment of their joint enterprise and that Gould was entitled to no commission for originally having produced a prospective purchaser. He further contended that the land had been listed for Ratliff by Rinehart, a partner of Swartz, with whom he divided the commission. Rinehart did not testify. From the evidence, it appears that it was the obvious intention of Ratliff to list his farm for sale with Swartz, the only person who took an active part in showing and selling the farm to Zimmerman.

In its opinion, the Trial Court aptly commented that "The finding of a purchaser who is ready, willing and able to consummate a deal is just as important a part of any transaction as the actual work of showing the farms and getting a prospective vendor. The law requires good faith in business deals, and in this case





good faith requires the division of the proceeds of this transaction.’’

From the circumstances in evidence, we are constrained to find that the judgment of the lower court holding that Plaintiff Gould was entitled to recover one-half of the commission arising from the sale of the land to Zimmerman was in accord with the greater weight of the evidence and that an implied contract for the payment thereof existed between the parties. A contract may be implied where an agreement in fact is presumed from the acts of the parties, and this is the proper meaning of an implied contract. An illustration of such a contract appears where one performs valuable services for another under circumstances showing that they were not intended to be gratuitous and the services were accepted. Here, both parties were and had been operating as duly licensed real estate dealers and for profit.

Other contentions were made by Appellant which we have carefully considered, but which we deem to be without merit. The record does not bear out defendant's contention that plaintiff's cause of action was predicated upon an alleged custom.

The judgment of the Circuit Court of DeWitt County in favor of Appellee Gould will therefore be affirmed.

*Judgment Affirmed.*



40771

REMBRANDT LAMP CORPORATION, an  
Illinois corporation,

(Plaintiff) Appellee,

TYNE CO., an Illinois corporation,

(Defendant) Appellant,

MILWAUKEE VALVE COMPANY, a  
corporation,

Third Party (Appellee).

MR. PRESIDING JUDGE. MR. CLARK. MR. CLARK. MR. CLARK. MR. CLARK.  
OPINION OF THE COURT.

Defendant Tyne Co. brings this appeal from a finding and judgment entered against it in the Municipal Court in favor of Rembrandt Lamp Corporation, Plaintiff, for the sum of \$339.69. The Milwaukee Valve Company was made a defendant at the request of the Tyne Co. An order was entered January 3, 1930, finding the Milwaukee Valve Company not guilty.

The theory of the plaintiff is that it purchased certain heating elements for its heating plant from the defendant, Tyne Co. under a three-year guaranty, whereby Tyne Co. agreed to replace the elements free of charge if they were not satisfactory; that the elements were unsatisfactory and that the plaintiff sustained damages by reason thereof.

The theory of the defendant, Tyne Co. is that the heating elements in question were designed for the heating plant of the plaintiff; that the elements did not work properly because of the fact that the plaintiff permitted acid to get into the heating system which corroded the elements, and that the elements were improperly installed by plaintiff's employee which caused the elements to rupture.

The theory of the defendant Tyne Co. as to Milwaukee Valve Company is that the elements in question were products of Milwaukee



Valve Company; that Milwaukee Valve Company induced Tyne Co. to accept the purchase order for the elements upon the same guarantee given by the defendant to the plaintiff, so that if there were any liability upon the part of the defendant to the plaintiff, the Milwaukee Valve Company would be liable to the defendant Tyne Co.

The evidence shows that when the order of September 21, 1938, was given by the Rembrandt Lamp Corporation to the Tyne Co., the latter being engaged in selling heating specialties, there appeared on the purchase order: "Guaranteed for three years from above date - will be replaced free of charge if not satisfactory." Tyne Co.

The evidence further shows that the defendant was in the steam heating equipment business and employed expert, scientific engineers who had a complete knowledge of all the equipment and heating specialties which were used to keep and maintain the heating systems in good working condition.

The evidence further shows that the plaintiff used wrought steel pipe in its business, which pipe plaintiff had been purchasing from the defendant Tyne Co; that in September 1936, the president of the plaintiff company told a salesman for the Tyne Co. that they were having difficulty with the traps in their heating plant and wanted Tyne Co. to furnish them with new elements for the traps; that Tyne Co. did not handle these elements, but telephoned to the Milwaukee Valve Company and asked that a sample of same be sent to plaintiff, which was done and an order was placed and the materials were delivered to the plant of the plaintiff and were installed by an employee of the Rembrandt Lamp Corporation; that after two or three months the elements failed to function.

Plaintiff further contends that the elements furnished were properly installed by its employee and <sup>the</sup> heating system operated only two or three months and that said materials were guaranteed for three years, that replacements were to be made free of charge within that period of time.

that period of time.

three years, that representations were to be made free of charge within only two or three months and that said services were furnished for same properly installed by the company. <sup>the</sup> The system consisted of a number of small, light-colored, rectangular panels, each of which was mounted on a wall by means of a single screw. The panels were arranged in a grid pattern, with a small gap between each panel. The panels were made of a material that was resistant to fire and theft, and they were designed to be easily removed and replaced. The system was installed in a room that was used for the storage of documents and records. The panels were used to store documents and records in a secure and organized manner. The system was designed to be easily accessed and used by the staff of the company. The system was installed in a room that was used for the storage of documents and records. The panels were used to store documents and records in a secure and organized manner. The system was designed to be easily accessed and used by the staff of the company.

Defendant further contends that the materials were furnished but that plaintiff permitted acid to get into the heating system which corroded the elements, and further contends that the elements had been improperly installed by plaintiff's employee and that, therefore, the defendant was not liable on its guarantee.

The Milwaukee Valve Company who furnished the elements at defendant's request contend that they were not parties to the guarantee and that they sold the elements to the Tyne Co. and are not responsible for subsequent happenings.

According to the purchase order offered in evidence, Tyne Co. was the seller of the materials to plaintiff.

From a review of the record it appears rather strange to us that the persons who handled these elements, both in the manufacture and in the installation did not detect any defect, but it may be possible that such defects could exist without being apparent until after the heating system had been in operation for some time.

There are no grave principles of law involved in this case, as it is based mostly on fact, but the question arises as to wherein lies the truth of the allegations made. The trial court saw the witnesses and heard them give conflicting testimony while upon the witness stand and was in a position to judge as to the preponderance of the evidence. We think the trial court arrived at the right conclusion.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

Present -- The Hon. FRED C. MCLELLAN, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 L.A. 24

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BE IT REMEMBERED, that afterwards, to-wit: C.  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A. D. 1938.

CARRICO & WILGUS, Inc., an  
Illinois Corporation,

Appellee,

vs.

C. E. FREEMAN,

Appellant.

APPEAL FROM THE CIRCUIT  
COURT OF WINNEBAGO COUNTY

DOVE, P. J.

This is an action brought by Carrico and Wilgus, Inc., an Illinois Corporation, to recover real estate commission from the defendant C. E. Freeman. Mary Colville was also a party defendant and while no order dismissing the suit as to her appears in the record, the suit was apparently abandoned as to her and proceeded against Freeman only. The cause went to trial before the court without a jury, resulting in a judgment in favor of the plaintiff and against the defendant Freeman for \$1100.00, from which Freeman appeals.

Count one of the complaint alleged, among other things, that on or about December 17th, 1936, Freeman came to the office of the plaintiff and employed the plaintiff to procure a purchaser for his property located in Edgebrook Addition; that he listed said property with the plaintiff and that said listing was an exclusive

1. The first part of the document is a list of names and addresses of the persons who have been notified of the hearing.

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listing given plaintiff by the defendant for a period of four months from December 17, 1936, or thereafter until revoked by defendant; that the defendant agreed to pay to the plaintiff a commission in case plaintiff should procure a sale of said property at the regular Rockford Real Estate Board rate; that at that time the record title to said real estate was in Mary Colville, who held title thereto for the benefit of Freeman; that plaintiff accepted said listing and spent its time and efforts up until March 11, 1937, in the sale of said property and among other persons contacted Raymond S. Perry, who subsequently purchased said property. Count two alleges that Freeman listed the property with the plaintiff for sale but that the listing was not an exclusive one. The third count was based upon the services alleged to have been rendered by the plaintiff to the defendant in connection with the property during the period the property was listed with the plaintiff for sale. By his answer the defendant Freeman denied that he ever gave the plaintiff an exclusive listing of the property or that he ever listed the property with the plaintiff, denied that he ever talked to the plaintiff about a commission or that the plaintiff made any efforts to sell the property or that he ever did sell the property to Perry or found a purchaser therefor, and denied that he ever employed the plaintiff to look after or manage the property.

The evidence discloses that in December, 1936, the defendant, who lived in Chicago, called at the office of the plaintiff and told William M. Carrico, its president, that he had a house in Edgebrook which he wished to sell and that he wanted Mr. Carrico to go and appraise it and see what the price should be; that within

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a day or so thereafter Carrico went out to the property, saw Mrs. Porter, who is Freeman's sister, and who was then the tenant in charge of the place, and she showed him through the house. On December 19th, 1936, Carrico wrote the defendant, reminding him that in their conversation defendant had not priced his property, and advised him that since their conversation he had inspected the property and that in his opinion it should bring at that time \$20,000.00 or a little less for a quick sale. This letter continues:

"If we can find a good buyer, would you carry back part of the cost of the house in a first mortgage or should we count on refinancing it from some other source. I feel I can sell this house near the above mentioned figure within a few months and would appreciate a letter from you answering the above questions and giving our office an exclusive listing for the next four months. This protection is most necessary for us if we are to work intelligently and without stirring up too much interest in the property, which has a tendency to lower the price. I have presented the property to Ernest Schwartz, 1712 Melrose Street, Rockford, Tolar B. Griggs, 1804 Oxford Street, Rockford and am trying to reach Raymond Perry, 1728 National Avenue, Rockford and Dr. Hobart W. Edson, 1334 East State Street, Rockford. These people are all prospects I have had in the past who I know are interested in Edgebrook property, and I feel will be able financially to buy this home. I will appreciate your immediate answer regarding the price of the house, your wishes in taking back a mortgage, and an exclusive listing, at your earliest convenience".

About the 18th or 20th of December, 1936, according to the testimony of Mr. Carrico, he called Perry, asked him if he would be interested in seeing the property and made a date with Perry to show him the property on the Friday before Christmas. That someone thereafter notified Carrico that Perry was ill and would not be able to inspect the property on the day agreed upon and on Christmas day Perry called on Carrico and advised him he was to be away during the holidays and arranged to be shown the house





when he returned. Carrico further testified that he did show Perry the property early in January, shortly after New Year's day, 1937; that subsequently Perry called Carrico and said he was not interested in buying the property at any price and this was communicated to Freeman by Carrico. Carrico further testified that some time in January, 1937, Freeman came to plaintiff's office in Rockford and Carrico submitted to him an offer made by Polar S. Griggs, which Freeman refused to accept. Carrico also testified that in this conversation Freeman stated he was in no hurry to sell the property, that plaintiff was the only office working on its sale, that plaintiff had the exclusive listing and for the plaintiff to continue its efforts. In this conversation Freeman requested Carrico to get the keys for the house from the Porters when they moved and to keep the gas heating plant in operation so the house would remain heated. On January 18, 1937, Carrico wrote Freeman, advising him that the papers stated that Mr. and Mrs. Porter were moving from the property and inquired what, if anything, Freeman desired the plaintiff to do. The Porters did move about February 1, 1937, and shortly thereafter, at the request of Freeman, brought the key to Carrico, who retained it until February 27th, when it was delivered to Freeman's attorney, who advised Carrico that Freeman was contemplating giving some one an option to purchase. Carrico also details two other conversations with Freeman, one about the first of February and the other about the middle of the same month, at which latter time Freeman again said that plaintiff had the exclusive listing of the property and that Freeman was not listing it with anyone else.

Francis Wilgus, who is secretary and treasurer of the plaintiff, testified that in a conversation with Freeman about the

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middle of February, 1937, Freeman stated to him that he was in no hurry to sell his property; that plaintiff had the exclusive listing of the property and that it was only listed with the plaintiff and no others.

Raymond S. Perry was called as a witness on behalf of the plaintiff and testified that in November, 1936, he inquired over the phone of Carrico whether he had the sale of the Freeman house and Carrico said he did; that a date was fixed for him to go and see the house, that he kept the engagement and went through the house the last week of November or possibly the first week of December and never talked to Carrico about the property thereafter. That neither he nor his wife were interested in the property after they saw it and dismissed its purchase from their minds and Perry so told Carrico; that about the third or fourth week of January, 1937, he, Perry, had some negotiations with Morgan Wise, a real estate broker, for a property on Spring Creek road, that the deal for that property was not consummated and Wise inquired of Perry whether he would consider the purchase of the Freeman house, that Perry replied he had seen it and rejected it, that Wise finally interested him in the property and gave him some information about it which he did not possess and took him to see the property again about the first of February and thereafter at Perry's request Wise obtained the option from Freeman, which was afterward exercised and resulted in the conveyance to Perry on March 6, 1937, Perry paying therefor \$22,000.00 cash. Perry further testified that Wise contacted him about the purchase of this property; that he did not contact Wise; that when Carrico showed him the property, Mr. and Mrs. Porter were living there and that when Wise showed it to him it was vacant; that after Carrico



had shown him through the house and he had told him that he wouldn't consider its purchase, he never talked to Carrico thereafter about its purchase and had dismissed it entirely from his mind until he became interested in it through Wise; that Wise is a good salesman, that he met his objections to the Freeman house with excellent suggestions as to how they could be overcome, secured information as to the cost of the heating and taxes and procured the architect who made the original plans to consult with Mr. and Mrs. Perry about the possibilities of making various interior changes, which suited their desires and which they subsequently made.

On behalf of appellant, Morgan D. Wise testified that he was a real estate broker in Rockford and in February and March, 1937, endeavored to interest Perry in the purchase of appellant's property and on February 26, 1937, he procured from appellant an option to purchase the premises for \$22,000.00. This option expired at noon on March 5th, 1937, and by its provisions appellant became obligated to convey to Wise, or such person or persons as Wise might direct, the Edgebrook property here involved. On March 4th, 1937, Wise notified appellant that he elected to exercise the option and on the same day assigned this option to Perry and thereafter on March 6th, 1937, the deed was executed by the convenient title holder, Mary Colville, to Perry at the direction of appellant, who received therefor \$22,000.00.

C. E. Freeman, the defendant, testified that he went to see Carrico the latter part of November or the first of December, 1936, and told him he was contemplating selling the house and that if he found anyone who wished to purchase it, that he would like to have the prospective purchaser get in touch with him, Freeman;

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that the word "Exclusive" was never mentioned in any conversation; that he never replied to Carrico's letter of December 19th, 1936 or any of his letters and that he had listed the property for \$25,000.00 with every real estate agency that asked for it and with at least six different firms; that he had a conversation with Carrico very shortly after December 19, 1936, in which Carrico told him he had shown the house to Perry but that Perry was not interested and that Perry himself told appellant that if he was going to spend \$20,000.00 he would build a house to suit himself. Appellant further testified that Wise came to see him about another property and in the course of the conversation stated he thought he might be able to sell the property involved in this proceeding but didn't think he could get \$25,000.00, which was the price appellant asked; that appellant stated he would take less if all the purchase price was paid in cash and later gave Wise an option to purchase and did not know Perry had anything to do with the matter until the plaintiff made a demand upon him for commission.

It is insisted by appellant that the evidence discloses that he did not employ appellee as an exclusive agent to find a purchaser for his property and that the trial court erred in not so finding; that the court also erred in finding that appellee was the procuring cause of the sale of the premises and that the judgment in appellee's favor was not warranted by the evidence.

From appellee's letter of December 19, 1936, it is apparent that appellee did not then have the exclusive listing of appellant's property and from a consideration of all the evidence in this record, we are of the opinion that appellant never at any

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time listed the sale of this property exclusively with appellee, but it is equally apparent that he did list it with appellee and expected appellee to look after the property after it became vacant. Robert W. Porter, a brother-in-law of appellant and who lived in the property testified that appellant so stated to him and also instructed him, when he moved, to deliver the key to Mr. Carrico. The evidence also is that after appellee had so received the key to the dwelling, other real estate brokers procured it from appellee for the purpose of showing the premises to their prospective purchasers. Appellee must therefore have known that its agency was not an exclusive one and there is no evidence in the record that sustains the allegation of the complaint that appellant listed his property with appellee for a period of four months from December 17, 1936.

In order then for appellee to recover under the second count of its complaint, it was necessary for it to prove that it was the efficient and procuring cause of the sale to Perry. The evidence is that appellee contacted Perry and took him to the property and he inspected it. Mrs. Porter testified that Mr. and Mrs. Perry came with Carrico and she showed them through the house; that subsequently Carrico phoned her and inquired how the Perrys liked it and she told him that they said they were not interested. According to the testimony of Carrico he first called Perry either the 18th or 20th of December, 1936, and showed him the property in January, 1937. Perry testified that Carrico did not call him but that he, Perry, called Carrico and inquired about the property in November, 1936, and that he looked at it either the last week of November or the first week of December. All of the evidence is to the effect that after Perry first inspected the property he apparently was not interested in its purchase and did not become interested until after he contacted Wise.

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Counsel for appellant argue that appellee could not be the procuring cause of the sale because Perry told Carrico after he had seen the property that he was not interested and that thereafter appellee did nothing to interest Perry in its purchase. Counsel for appellant also insist that the option to Wise was not only executed in good faith but by it appellant sold the property to Wise and that it was not a sale to Perry through Wise, a second real estate broker. It is true that Perry, after he first inspected the property, said he was not interested in the property in any way. At that time perhaps he was not, but within a comparatively short time thereafter he became the purchaser thereof. The sale here was ultimately made to Perry not to Wise and made upon terms satisfactory to the buyer and to the seller. The element of the buyer being able, ready and willing to purchase the premises on the terms agreed upon in the contract of employment were therefore eliminated. *Ogren v. Sundell*, 220 Ill. App. 584. In the *Ogren* case, as here, the defense was that the broker had abandoned the sale. In this connection the court said: "It is the contention of the defendant in error that before the sale, which was finally made by the defendant in error to the Olsons, was consummated, the plaintiff in error had abandoned his efforts to sell the property to the Olsons; and that they had had their minds made up that they could not buy it; and that the transaction concerning the sale of the property in which the plaintiff in error participated, and which might have resulted in a sale, had ended, was so considered both by the defendant in error and the purchasers; that it was only through the intervention of the third party that a sale was finally made. These matters involve questions of fact, which are for the determination of a



jury; and this is true concerning the other question, which is raised in the case, namely, whether the services rendered by the plaintiff in error were the procuring cause or effective means which finally resulted in the sale of the property by the defendant in error. *Reed v. Young*, 146 Ill. App. 210. The mere fact that the seller consummates the sale, or that it was made upon terms different from those proposed to the broker, does not necessarily deprive the broker of his commission. If it appears that the purchaser was induced to apply to the owner through the instrumentality of the broker or through means employed by him or that the sale was effected through information derived from the broker, the broker would be entitled to his commission, although the sale was consummated and the deal closed finally by the owner. *Hafner v. Herron*, 165 Ill. 242; *Rounds v. Victoria Hotel Co.*, 184 Ill. App. 501."

In *Hafner v. Herron*, 165 Ill. 242, the court held that the broker, having introduced a sufficient purchaser to the owner, is not to be deprived of his commission because the owner negotiates the contract himself or voluntarily reduces the price. Counsel for appellant insist that the principles of law announced in this and the other cases hereinbefore cited are not applicable to the facts as disclosed by this record because here, they say, the sale was not made by the owner to the broker's customer but the sale was actually made by appellant, not to Perry, but to Wise, and cite and rely upon the case of *Stone v. Kreis*, 202 Ill. App. 43. The facts in that case and in the instant case are clearly distinguishable. The evidence here is that Wise is a real estate broker and appellant testified that Wise told him he thought he might be able to sell the property and requested that appellant



would give him an option to buy. The evidence in this record is that appellant did not sell directly to Wise. The instrument executed by Freeman on February 26, 1937, did not obligate Wise to buy, nor did Wise agree to buy. Freeman, however, did agree to sell to Wise or such person as he might direct upon the payment of a specified consideration within a specified time. Appellee was the first broker who sought to interest Perry in the purchase of this property and appellant knew it. Appellant's attorney, prior to the time the conveyance to Perry was executed, knew that Perry was in fact the purchaser. Under the circumstances the knowledge of appellant's agent and attorney was the knowledge of appellant and Wise in fact was not the purchaser but was the agent of appellant.

Whether the services rendered by appellee were the procuring cause or effective means which finally resulted in the sale of the property to Perry was a question of fact. The finding of the trial court upon this issue was in favor of appellee and we are unable to say such finding was not warranted by the evidence. The judgment will therefore be affirmed.

JUDGMENT AFFIRMED.





STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

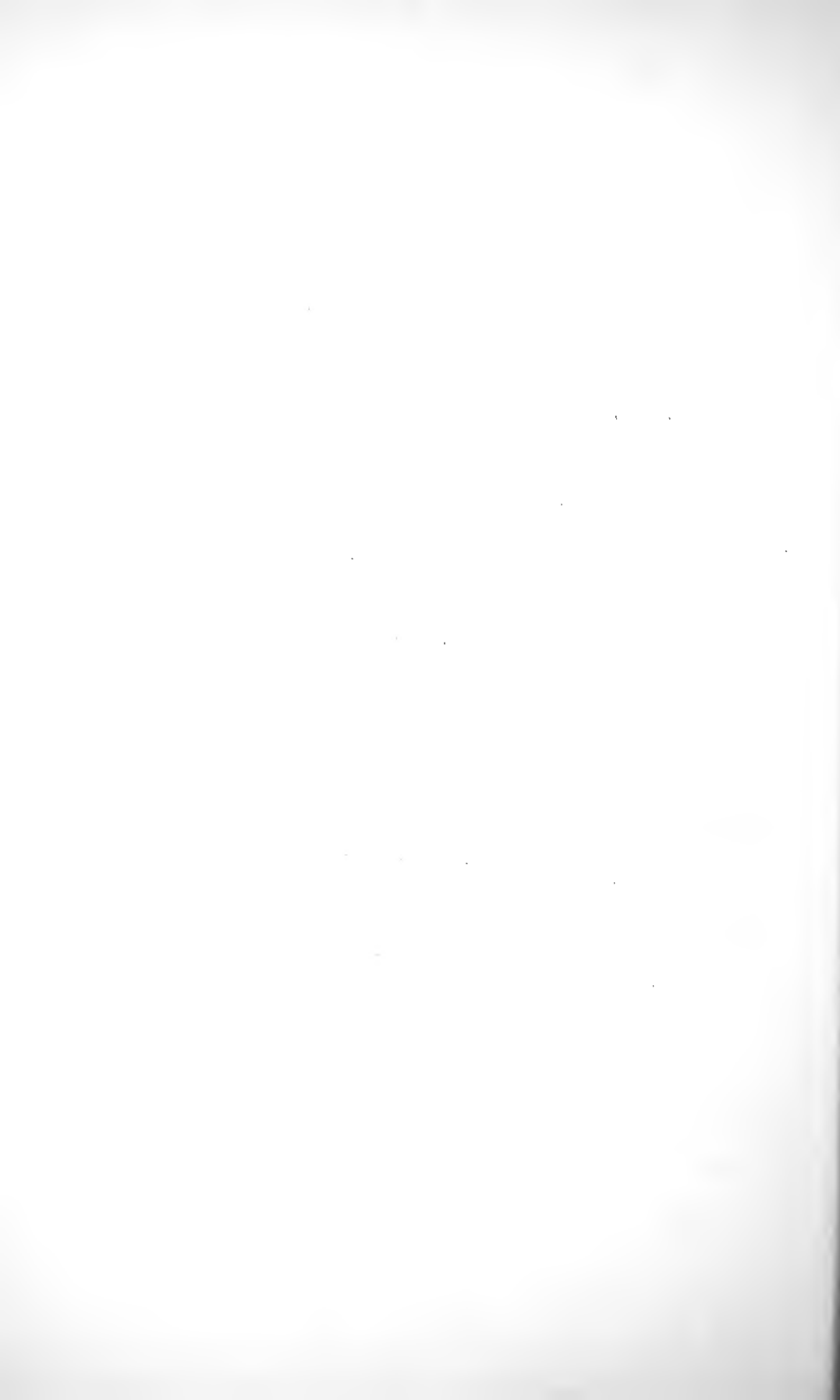
JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 I.A. 25

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT

SHOCK COUNTY, ILLINOIS

OCTOBER 1, A.D. 1939.

ROBERT K. ROSS, Administrator  
of the Estate of Gordon Lee  
Ross, deceased,  
Appellee,  
vs.  
RUSSELL CRANK,  
Appellant. ))

ALL PROCEEDINGS  
SHOCK COUNTY, ILL.  
CITY.

HUFFMAN -J.

This is an action by appellee, as administrator of the estate of Gordon Lee Ross, to recover for said deceased's alleged wrongful death. Deceased came to his death on the night of January 1, 1938, upon state highway 24, at a place about two and a half miles west of Bartonsville, Illinois. Trial of the case resulted in a verdict for plaintiff appellee, and appellant brings this appeal to reverse the judgment on the verdict.

The accident occurred at about 5 o'clock on the morning of January 1. The deceased had been attending a New Year's party at a tavern at Mayleton. Upon leaving the party he had started to walk upon State Highway 24, was 20 feet in width and consisted of two traffic lanes, designated by the usual center line marking. It ran in a general north and south direction at the place of the accident. Appellant was driving south upon the highway. The deceased was walking north thereon.

There were no eyewitnesses to the accident, unless it might be said to have been appellant. The deceased was alone and appellant was alone. Appellant was called under section 6, of the Practice act, by the plaintiff and examined regarding the accident. He testified that he was driving between 40 and 50 miles an hour; that it was dark; that he

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was alone; and that the pavement was dry. He further stated that he had the lights of his car turned on; that he encountered an accident; and that he did not know what happened. He stated that he did not see the deceased at the time he was struck by the car. Following the accident, a pollman says that he continued forward at 5 feet, then he pulled over to the side of the pavement and stopped. He stated that he went back to see if he could determine what was the cause; that he found no one; that he became alarmed and excited; that he returned to his car and drove to the city of Pekin where he met Sergeant Grant, a Sergeant of the State Highway Police, and that he returned to the place where the accident had occurred.

It appears from the testimony of Mr. Grant that the accident occurred at a point about five miles from Pekin. When they arrived at the scene of the accident the deceased had been removed. Mr. Grant states the condition of the highway indicated that the collision between deceased and appellant's automobile occurred in the west traffic lane. He further states that the left front headlight of appellant's car had the glass broken out, that there was a dent on the left front fender, and that he also saw skid marks which he estimates to have commenced about 26 steps from the place where deceased was apparently struck. He further states that appellant told him, that as he came around a slight curve or bend in the road in approaching the place of the accident, he suddenly saw a man in the road, whereupon he applied his brakes and pulled his car to the right in an effort to avoid striking him. He says appellant stated that he was about 25 to 30 feet from the man when he first saw him. The officer says appellant gave no evidence of having been drinking intoxicating liquor. He further states that the skid mark nearest to the center line of the pavement was about 3 feet west of such center line, and that the collision of the pavement indicated the place of impact between the car and the deceased to be at a point about 18 inches west of the center line of the pavement.

Highway patrolman Nelson, in company with others, removed the deceased from the side of the highway to the hospital at Pekin. Merle Guidi was the first person to find the deceased following the accident. He found him lying about two and a half feet east of the center line of the pavement. When he first passed the place going south, he did not

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recognize what the object was he saw on the pavement and turned around <sup>and</sup> went back, where he found the deceased.

It appears the deceased sustained a fracture of the skull on the left side, and that his left leg was broken below the knee. In addition to these injuries he had numerous other bruises over the left side of his body, but it appears his death was caused from the skull fracture. He was rendered unconscious when struck by the car, and never regained consciousness.

It is urged by appellant that the record is silent as to the car on the part of deceased. The evidence discloses that the deceased was struck by appellant's car at a place on the pavement about 18 inches west of the center line thereof, and in appellant's traffic lane. It appears that the impact knocked the deceased to the pavement and across the center line and about 2 1/2 feet into the traffic lane that would be used for cars going north. This is where the witness Guidi found the injured man. Appellant was called by the plaintiff under sec. 60, and interrogated regarding the accident. So far as his testimony in that respect goes, it merely discloses that he was proceeding south in his proper traffic lane at a speed of from 40 to 50 miles an hour; that his headlights were burning; that it was dark in the open country; that he suddenly saw a man on the pavement in front of his car; that he applied the brakes and swerved his car to the right in an effort to avoid striking him; that he knew an impact occurred but that he did not see that man at the moment of the impact; that he proceeded about 50 feet before bringing his car to a stop on the side of the pavement. There is nothing in connection with this evidence to show either due care on the part of the deceased or negligence on the part of the appellant. Evidence of other witnesses establish the fact that the deceased ~~was~~ struck by the left front part of appellant's car and at a place in appellant's traffic lane about 18 inches from the center line of the pavement.



Appellee urges that where there are no eye witnesses, due care and caution on the part of the injured person will be presumed, and that the rule of self-preservation is sufficient to establish a presumption ~~is sufficient to establish a presumption~~ that the deceased was in the exercise of due care and caution for his own safety immediately prior to and at the time of the accident. We are unable to agree to this proposition of appellee. The rule is so well established in actions of this kind, that the plaintiff must allege in his complaint the exercise of due care and caution for his own safety immediately prior to and at the time of the accident; and that the burden is upon him of proving such fact; that we do not consider the citation of authorities in support thereof, necessary.

It is generally considered that a plaintiff cannot recover in an action such as this, unless it appears he was in the exercise of ordinary care for his own safety, and where there is no evidence tending to show he was in the exercise of due care, and no circumstances in evidence to raise a reasonable inference that he was in the exercise of such care, it is the duty of the court to direct a verdict for the defendant. A party may not knowingly expose himself to danger and then be permitted to recover damages for an injury which he might have avoided by use of reasonable precaution. *I. C. R. R. Co., v. Oswald*, 338 Ill. 270, 274, 275. By the terms of the Injuries Act, under which this suit is brought, action for the wrongful death cannot be maintained except in such cases as the injured party himself could maintain.

The evidence shows that the deceased was walking toward appellant's car; and that appellant had the lights of his car turned on. The deceased was struck in appellant's traffic lane near the center of the pavement, and at a time when there appears to have been no other automobile approaching from either direction. From an examination of the record we are of the opinion that the verdict is not supported by the evidence.



The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

Be not so much concerned for the future as for the present. The present is the only time we have.

STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and  
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby  
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause.  
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said  
Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand nine  
hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





40606

LOUIS H. PINK,  
Appellant,

v.

ABE CHINSKEY,  
Defendant below.

JOSEPH J. MERENSKY et al.,  
Intervening Petitioners.

U. S. FIDELITY AND GUARANTY  
COMPANY, a corporation,  
Garnishee below,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

303 I.A. 55

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Louis H. Pink, plaintiff herein, had judgment against Abe Chinskey, defendant, for \$782.18 and costs. Execution issued thereon and was returned "no property found and no part satisfied." Thereafter plaintiff instituted garnishment proceedings against the United States Fidelity and Guaranty Company, and the writ was issued and served upon the latter as garnishee. The answer filed by garnishee stated that it had no funds in its hands belonging to defendant, Abe Chinskey, "but at the time of the service of the summons in this cause it was indebted to Abe Chinskey, jointly with one Joseph J. Merensky, in the sum of \$750; that it had no moneys, choses in action, credits or effects, lands tenements or chattels belonging to the said Abe Chinskey subject to garnishment at the time of the service of the writ but it did have in its possession a check in the sum of \$750 issued by the garnishee, payable to the order of Abe Chinskey and Joseph J. Merensky, jointly; that on information and belief the garnishee states that Joseph J. Merensky and Sam J. Kosbie have or claim some right, title or interest in the check in the sum of \$750, and prays that an order be entered directing the plaintiff to serve notice upon the said parties to make claim, if any, to the said fund." Pursuant to the filing of this answer,

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1. *Phragmites australis* (Cav.) Trin. ex Steud.

1. *Chlorophyll a* (Chl *a*) is the primary photosynthetic pigment in most plants and algae. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum.

to Chinskey,

ANSWER FILED BY: [REDACTED] DATE: [REDACTED]

—The following information was obtained from the files of the FBI:

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tion a check in the sum of \$50 in cash for the amount of \$50.00.

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It is noted that the above information was not

and Sam J. Kopske have or claim some right title or interest in the

check to the sum of \$250 and advise that an order be entered directing

the plaintiff to serve notice upon the said parties to make a date

any, to the said fund." Pursuant to the filing of this answer

Merensky and Kosbie had leave to file their intervening petitions. Merensky's petition alleged in substance that Chinskey had a claim against one Arthur Enzmann and the U. S. Fidelity and Guaranty Company, to enforce which a suit being case No. 4044670, was then pending in the Municipal court of Chicago; that prior to the issuance of the garnishment writ Chinskey, being indebted to Merensky in the sum of \$311, executed an assignment in writing transferring his right, title and interest in Chinskey's claim against Enzmann and the U. S. Fidelity and Guaranty Company, including any judgment that might thereafter be entered in the municipal court <sup>in the cause</sup> then pending; that the check evidencing the fund in the possession of the garnishee was issued in payment of the judgment entered in that case; and that the intervening petitioner claimed priority over all claims to the extent of \$311 and costs.

Sam J. Kosbie, the other intervening petitioner, likewise claimed an assignment of Chinskey's claim against Enzmann and the U. S. Fidelity and Guaranty Company to the extent of \$425, predicated upon an alleged indebtedness of Chinskey to Kosbie, evidenced by a promissory note which antedated the issuance of the garnishment writ, and it was alleged in Kosbie's intervening petition that the fund in possession of the garnishee and the check evidencing the said fund was issued in payment of a judgment in the municipal court in favor of Chinskey in cause No. 4044670, and that Kosbie claimed priority to the said fund to the extent of \$425 and costs.

Plaintiff filed no traverse of the garnishee's answer, but the cause proceeded to trial in the municipal court without a jury. Joseph J. Merensky, representing Chinskey, then apprised the court of the nature of the suit, and said that the answer of the garnishee set forth a joint account, which it contended was not subject to garnishment. He said that "a man from Mr. Kealy's (attorneys for garnishee) office will be here who had a check from the U. S. Fidelity and Guaranty Co. \*\*\* for \$750 payable to Abe Chinskey and Joseph Merensky, his attorney, which I wish to introduce if there is no



objection." Plaintiff's attorney said there would be no objection to the check, but that he wanted to interrogate Mr. Kealy. Merensky then stated that Mr. Kealy was engaged in another court, but had promised to send some one with the check who would verify that part of the answer which averred that it was a joint account. Thereupon a colloquy ensued between court and counsel, touching upon the two questions as to whether or not there had been an assignment of the judgment prior to the date of the garnishment writ and whether the check represented a joint account. Kosbie stood upon his assignment and claimed that it was made before the garnishment writ had issued. Plaintiff's counsel insisted that no assignment was ever made, filed or given until after the garnishment proceeding had been instituted. Thereupon Mr. Merensky invited the court to "first rule whether or not this is a joint account," suggesting that if the court would so hold it would end the entire proceeding. Plaintiff's counsel objected to this motion, contending that there was no evidence of the judgment, and that "we garnisheed the judgment and the account. They come in with a check. I don't care how they want to pay the judgment. We garnisheed a certain specific thing. Now, I object to the Court ruling until he has heard the evidence. We have no such evidence as yet to the check and we want the U. S. Fidelity and Guaranty for certain evidence." Thereupon the following conversation ensued between court and counsel: "The Court: Let the U. S. Fidelity and Guaranty Co. state whether they could give this check jointly or separately. Mr. Merensky: Could they what? The Court: Could they issue this check to Chinskey alone? Mr. McKay: They didn't owe Merensky anything. Mr. Merensky: I have an attorney's lien there. Mr. McKay: There is no notice of lien. Mr. Merensky claimed in his intervening petition that he was not entitled to the judgment, and that he only has a lien for \$311. Mr. Kosbie: Originally this was a replevin suit which resulted in a finding for the defendant. We then started suit on the replevin bond which included a claim for \$675 and \$300 attorney's fees. About the middle of September this suit was compromised and a judgment was entered for



the plaintiff in the amount of \$750. This check was issued to Merensky and Chinskey, Chinskey being the plaintiff in this suit. The U. S. Fidelity and Guaranty Co. had no way of dividing the check. Mr. Merensky did not have to serve notice of the assignment. He can serve notice of the assignment the day before the trial. The check cannot be severed, part given to Merensky because they didn't know how much to give Merensky and I didn't know at the time the check was issued. We know it is a joint fund. Before the Court can go into the question of whether or not the assignments are valid or invalid, you must determine the validity of the answer. If you determine that the fund belongs to the judgment debtor, you can determine whether or not the assignment is valid. If there is a joint account there is nothing left to do but discharge the garnishee.

"Mr. McKay: Mr. Merensky's claim is only for a lien up to a certain amount, then a month or a week or so later Mr. Kosbie's brother came in and filed another intervening petition. The petition shows that Mr. Merensky has a lien for \$311 and Mr. Kosbie's brother has an assignment for the rest. The only thing we want to do is for the Court to hear evidence and decide.

"The Court: I don't think the U. S. Fidelity and Guaranty Co. will ever divide checks into two parts. They could not because there would be liability if they misdirected the sums, so that to protect themselves there is one joint check. Mr. Merensky's claim may be \$700 by the time he gets through with Mr. Chinskey, regardless of the lien.

"Mr. McKay: How can the Court assume that Mr. Merensky had any claim? He was not the attorney in the case in which the judgment -

"The Court: I do not assume anything except that they know they cannot issue any other check except this kind of a check.

"Mr. McKay: If I called the U. S. Fidelity & Guaranty Co. and said that I represented Joe Merensky and he has not paid my fee, will they make joint checks? They are not going to take chances. The question between the creditor and this man Chinskey in making an





assignment of something that he didn't own is something different.

"The Court: We are not discussing that. The first point I must dispose of is whether or not this is a joint account.

"Mr. McKay: You mean whether the judgment is a joint account. I am not interested in the check. I am interested in what we garnisheed, not how they attempted to pay.

"Mr. Merensky: You garnisheed the \$750.

"Mr. McKay: Let us have the pleadings to see what we garnisheed. We garnisheed the judgment against the U. S. F. & G. They never delivered the check.

"Mr. Merensky: Of course they didn't because they held the check up when the garnishment came in.

"Mr. McKay: It is the evidence we want, not what we think. They are all lawyers in it."

Following this colloquy between court and counsel the garnishee offered the testimony of Henry L. McIntyre, a young lawyer employed in the offices of the attorneys for the garnishee, who produced the check for \$750 made payable to Chinskey and Merensky, his attorney, and stated that he knew nothing of the exhibit except that it had been taken from the files in their office and handed to him at 9:30 that morning; that he was not familiar with the signature and knew nothing of the circumstances attending the transaction. Plaintiff's attorney then moved to strike the check as an exhibit, and that motion was denied by the court. Mr. Merensky thereupon offered in evidence defendant's exhibit 2, which was a letter from the U. S. Fidelity & Guaranty Company's surety claim department, addressed to Eugene P. Kealy of the firm representing the garnishee, which letter accompanied the check and contained the following concluding paragraph: "Attorney Merensky telephoned us this morning demanding his money, and we told him we would put our draft in your hands at once. We are still hopeful, however, that you will be able to persuade attorney Shaver (attorney for plaintiff), to make this payment direct, and thereby put yourself in position to return our draft to us unused." At the conclusion of

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however, that you will be able to persuade attorney Shaver (attorney

for plaintiff), to make this payment direct, and thereby put yourself

in position to return our draft to us unused." At the conclusion of

this evidence and the conversations hereinbefore set forth, Mr. Merensky moved for the discharge of the garnishee. The motion was allowed and judgment entered accordingly.

It is urged as ground for reversal that defendant's exhibits 1 and 2, being the check for \$750 and the letter accompanying it, were not identified or proved genuine and therefore should not have been admitted in evidence, and also that the record supports a finding that the funds in the hands of the garnishee were the sole property of the judgment debtor and therefore subject to garnishment, and that the discharge of the garnishee for the reason that there was prima facie evidence of a joint account was improper in the absence of a full hearing on the intervening petitions.

The garnishee takes the position that its verified answer should be taken as true if not denied or contested; that the burden of proof in a garnishment proceeding is on the plaintiff to establish a garnishable debt; and that an indebtedness from the garnishee to the judgment debtor of the creditor proceeding in garnishment, and others not made parties to the garnishment action, cannot be reached by garnishment, and it is argued that under the provisions of sec. 7 of the Garnishment act (chap. 62, sec. 7, Smith-Hurd Ill. Rev. Stats. 1937) and Rule 226 of the Revised Civil Practice Rules of the Municipal court of Chicago, the answer of the garnishee under them should be taken by the court as true where no traverse thereof is made, and that the court was justified in rendering judgment for the garnishee. Under ordinary circumstances these contentions could be justified by the statutory provisions and the decisions cited by garnishee's counsel, but a careful examination of the abstract of the record clearly discloses that the parties submitted the cause to the court for trial and the question therefore arises whether the judgment was justified by the evidence adduced before the court. The garnishee in its answer averred that it had in its possession a check for \$750, payable to Chinskey and Merensky, jointly. There was no explanation, however, why the check



was so made. It is evident from the record that the judgment of the municipal court against Enzmann and the U. S. Fidelity and Guaranty Company in favor of Chinskey was not a joint judgment and some explanation should have been offered upon the hearing as to why the check was made out in this manner. The record is absolutely silent on this question. On the other hand, both of the intervening petitioners claimed an interest in the judgment by reason of prior assignments from Chinskey to them and not upon the theory of a joint judgment. No proof, however, was offered or made upon the hearing of any assignments or whether the assignments, if made, were executed prior to the issuance of the garnishment writ. Plaintiff contended that the assignments were made after the writ had issued, but the record is silent upon this question, except that the dates given in the intervening petitions indicate that the assignments antedated the garnishment writ. This was a controverted question and should have been tried before the court by competent evidence.

The garnishee contends, of course, that since no traverse was made of its answer and of the intervening petitions, all of the facts averred in the answer and petitions were taken as true and that no evidence was necessary. If the garnishee and the petitioners had stood on their answers without a trial there might be some force to this contention, but they proceeded to introduce evidence, and having done so the real question presented to the court was whether the pleadings of the garnishee and intervening petitioners could be sustained by evidence. Plaintiff did make an oral traverse of all these pleadings and the parties having submitted the cause to the court for hearing plaintiff had a right to insist on a full trial. As said by plaintiff's attorney in the course of the conversation between court and counsel, "the only thing we want to do is for the court to hear evidence and decide."

The difficulty with the proceeding, as we view it, is that the court assumed this to be a joint judgment simply because the check



was made payable jointly to Chinskey and Merensky. The garnishee's answer does not allege a joint judgment and there was no basis for so finding upon the record. Because of these considerations, we have concluded that the ends of justice will be better served if the cause is fully tried. The finding and judgment is not supported by the record as it stands. The judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

was made possible by the fact that the  
 answer does not require a full and complete  
 finding upon the facts. It is sufficient  
 to conclude that the facts are such that  
 it fully satisfies the requirements of the  
 record as to the facts. The facts are such  
 for a full and complete finding upon the facts.

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40619

JOHN F. CELLA et al.,  
Appellants,

v.

CITY OF CHICAGO, a Municipal  
corporation,  
Appellee.

)  
)  
) APPEAL FROM SUPERIOR COURT,  
)  
) COOK COUNTY.  
)

3031.A. 561

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John F. Cella and various other plaintiffs brought suit in the Superior court against the City of Chicago, seeking to recover interest on condemnation judgments rendered in local improvement proceedings. The causes were consolidated for trial and judgments were entered in favor of the city. This consolidated appeal followed.

From a stipulation of facts entered into in the Cella case it appears that plaintiff was the owner of certain improved real estate in Chicago; that in June, 1925, the city brought condemnation proceedings against this and other parcels of land to acquire land for public street purposes in connection with the widening of Western avenue. Final and unconditional judgment was entered against the city and in favor of Cella in the sum of \$65,000, as compensation for that portion of his property which was taken, and the sum of \$27,060 was assessed for benefits against the remainder of his property. Thereafter, on August 2, 1930, Cella was paid by the city the net award of \$37,940, and he conveyed the condemned premises to the city by deed to consummate the transaction. No protest or claim for interest was made by Cella at the time of payment, and nothing was said by either party with respect to the payment of interest. It was further stipulated that interest at 5% from July 13, 1928, to August 2, 1930, upon the net award of \$37,940 would amount to \$3,898.13. Cella brought suit against the city to recover this sum, and the other plaintiffs in the consolidated cases also filed suits to recover

40619

Wm. A. Smith, Jr.  
Attorney

CLYDE W. SMITH  
CITY OF NEW YORK

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Answer

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interest in various amounts on their condemnation judgments under similar circumstances.

During the pendency of this appeal an order was entered in this court May 23, 1939, consolidating this proceeding with cause No. 40782, and June 15, 1939, a like order was entered consolidating it with cause No. 40783.

The only issue involved in this case and in the two causes consolidated therewith is whether the claim for interest, in the absence of any protest by the owner at the time when the condemnation judgment was paid, is extinguished or waived by the acceptance of the principal. This question has been the subject of much litigation in the courts during recent years, and is fully discussed in University of Chicago v. City of Chicago, 258 Ill. App. 189. (See, also, Turk v. City of Chicago, 352 Ill. 171; Blaine v. City of Chicago, 366 Ill. 341; Feldman v. City of Chicago, 276 Ill. App. 142, reversed in 363 Ill. 247, and the various authorities discussed in these decisions.)

When the case at bar came on for oral argument attention was called to the case of Northwestern Yeast Co. v. City of Chicago, 301 Ill. App. 303, which was filed by the first division of this court October 3, 1939. Counsel for the respective parties agreed that the question involved in that proceeding was precisely the same as in these consolidated cases, and on the suggestion of the court it was agreed to defer the decision in these cases until a petition for leave to appeal filed by the city had been disposed of by the Supreme court. That petition was denied by the Supreme court <sup>the</sup> in December, 1939 term, and there can no longer be any question as to the right of these plaintiffs to recover interest on their respective judgments.

The only difference between these consolidated cases and the Northwestern Yeast Company proceeding is that in the latter case plaintiff claimed that when the city paid the judgment rendered in the condemnation proceeding, it protested because of nonpayment of interest, whereas the city insisted that the payment was received without protest. The court

interest in various ways. In the case of the defendant, the interest was similar to that of the plaintiff.

The court, in its opinion, stated that the defendant's interest was not a mere expectancy, but a vested interest, and that the plaintiff's interest was a mere expectancy.

The court further stated that the defendant's interest was a vested interest, and that the plaintiff's interest was a mere expectancy. The court also stated that the defendant's interest was a vested interest, and that the plaintiff's interest was a mere expectancy.

The court then stated that the defendant's interest was a vested interest, and that the plaintiff's interest was a mere expectancy. The court also stated that the defendant's interest was a vested interest, and that the plaintiff's interest was a mere expectancy.

The only difference between the two cases is that in the latter case the plaintiff claimed that when the city paid the judgment rendered in the condemnation proceeding, it protested because of nonpayment of interest, whereas the city insisted that the payment was received without protest. The court

took evidence on this issue of fact and found that no protest was made. The parties in the case at bar have stipulated that none of the plaintiffs protested when the principal amount of the condemnation judgment was paid to them. In discussing the question under consideration in the Northwestern Yeast Company case, the appellate court said that as a matter of law the issue of fact made was immaterial. They again reviewed the various decisions and others hereinbefore cited and reached the conclusion that the mere failure of plaintiff to protest that interest was not included at the time the judgment was paid "did not amount to a waiver, to a novation, to an accord and satisfaction, or to a gift," and the judgment for interest was accordingly affirmed.

Because the various decisions upon which the determination of this question rests are of such recent origin, and have been so frequently cited and discussed in the cases hereinbefore mentioned, and others, we think it would serve no useful purpose to again review them. The Supreme court, in denying leave to appeal in Northwestern Yeast Co. v. City of Chicago, has in our opinion conclusively settled the question.

Under the stipulation of the parties in this consolidated appeal, it was agreed that if the judgments of the Superior court were reversed that judgments should be entered in this court in the respective amounts set out in the stipulations. The judgments of the Superior court are reversed in consolidated cause No. 40619, and judgments entered here against the City of Chicago and in favor of the following plaintiffs for the amounts set opposite their respective names: John F. Cella - \$3,898.13 and costs; Central Masonic Temple - \$9,415.44 and costs; George A. Chapman - \$7,925.36 and costs; Sarah Provus - \$14,955.51 and costs; Cameron Can Company - \$13,769.59 and costs; Carroll D. Keeler - \$6,263.74 and costs; Bertha S. Ullman, Simon Schiff and Murray Wolbach, as executors of the estate of Jacob N. Nusbaum, deceased, - \$33,175.18 and costs.

JUDGMENTS REVERSED AND JUDGMENTS HERE FOR PLAINTIFFS  
AND AGAINST THE CITY OF CHICAGO, AS SPECIFIED.

Sullivan, P. J., and Scanlan, J., concur.



40746

IN THE MATTER OF THE ESTATE OF  
HATTIE C. WILSON, deceased.

MARY P. KISER, Claimant  
below,

Appellee,

v.

FRANK G. SMITH, executor of the  
estate of HATTIE C. WILSON, deceased,  
Appellant.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

3031A.56<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Frank G. Smith, as the executor of the estate of Hattie C. Wilson, deceased, appeals from judgment of the Circuit court allowing the claim of Mary P. Kiser against the estate for the sum of \$1,168.

The deceased, Hattie C. Wilson, was the widow of one Dr. John T. Wilson, who during his lifetime operated a hospital in Chicago, where the claimant, Mary P. Kiser, had received training as a nurse. In 1935 an operation was performed on deceased at the Henrotin hospital and she returned to her home on March 16 of that year. Dr. Austin W. Gray, who had been an associate of Dr. Wilson, was the personal physician and confidant of deceased, and in compliance with her request he arranged for claimant, at that time a registered nurse and located at Lawrence, Kansas, to come to Chicago for the purpose of nursing deceased. Miss Kiser arrived in Chicago March 30, 1936, and according to Dr. Gray's testimony she was to perform twenty-four hour a day service in attending deceased during her last illness and to receive therefor \$10 a day. Miss Kiser attended deceased until her death September 4, 1936, and remained at the home for ten days thereafter. The court awarded her compensation at the rate of \$8 a day, aggregating

IN THE COURT OF THE DISTRICT OF COLUMBIA  
 Case No. 10,000

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.

JOHN A. KISSER, Plaintiff,  
 vs.  
 WILLIAM A. KISSER, Defendant.



\$1,168.

The sole contention made is that the finding and judgment of the court are not supported by the evidence. It is first urged that the contract of employment was not clearly established. As to this phase of the case Dr. Gray testified that upon the specific request of deceased he caused a telephone call to be made to Miss Kiser at Lawrence, Kansas, and that she arrived in Chicago the following morning pursuant to his request; that deceased told Dr. Gray that she would pay the plaintiff \$10 a day for her services; that upon her arrival in Chicago she went to the home of deceased, assumed her duties there as nurse, and remained on the case until ten days after the death of deceased, except that in July she put in only twelve days and during part of the period from March to September of 1936 she was relieved at short intervals by other nurses. Mattie B. Henry, another witness, testified that she was a nurse and visited deceased about once a month; that she knew plaintiff was the nurse in charge from the time of her arrival in Chicago, March 30, 1936, until after the death of deceased. Another witness, Daisy Woodward, testified that she was a tenant and friend of deceased and saw her every day, and that deceased had told her she was going to pay Miss Kiser \$10 a day. There is substantially no contradiction of this evidence and the fact that Miss Kiser evidently came here at the request of deceased and attended her from the time of her arrival in Chicago until her death seems to justify the finding that there was an agreement for the employment.

It is next urged that there is no evidence that plaintiff performed the contract. It is here argued that the evidence of Mattie B. Henry, who visited deceased once a month, does not substantiate the contention that the contract was fully performed. However, Daisy Woodward, who was a tenant in the building where deceased lived, stated that she saw her every day and that Miss Kiser was in attendance. Defendant places emphasis on the testimony of Miss Woodward, that "I could not say that Miss Kiser put in 24

The court found that the contract was not performed by the defendant, and that the plaintiff was entitled to recover damages. The court also found that the defendant had acted negligently, and that the plaintiff was entitled to recover punitive damages. The court awarded the plaintiff \$10,000 in damages, and \$5,000 in punitive damages. The court also ordered the defendant to pay the plaintiff's attorney's fees.

The court's decision was based on the following findings:

- The contract was valid and enforceable.
- The defendant failed to perform its obligations under the contract.
- The plaintiff suffered actual damages as a result of the breach.
- The defendant's conduct was negligent and reckless.
- Punitive damages were warranted to deter similar conduct in the future.

The court's decision was affirmed by the appellate court.

hours a day," which contention in our opinion is rather facetious. Obviously, on one could testify to such a fact except the claimant herself, but it is clear from the evidence that Miss Kiser was on the case constantly with the exception of a period in July and during parts of the time when she was relieved by other nurses. Obviously, Miss Kiser, who was on twenty-four hour a day service for almost five months, needed some relief and rest, and the fact that other nurses came in from time to time to relieve her for short periods does not negative her claim that she rendered the services claimed. There is evidence in the record that \$8 a day would have been reasonable compensation for half time service, and the record discloses that she rendered such service.

The remaining contention is that there is no evidence that deceased breached the alleged contract. It is suggested that Miss Kiser might have been paid from time to time, and counsel for defendant say that it is incomprehensible that a person in good financial circumstances, as deceased undoubtedly was, would have allowed four and one-half months to elapse without paying the nurse on duty for her services. The evidence, however, is all to the effect that these services were not paid for by deceased during her lifetime. Defendant asserts that the testimony of Dr. Gray is not to be believed, because he was clearly impeached on other material evidence, but from the whole record we are satisfied that the claim was properly allowed. There is no doubt that Miss Kiser came here specially from Lawrence, Kansas, to attend deceased as nurse, that she did attend her substantially the entire period from March to September, 1936, and the court was justified in finding that she had not been paid for her services. Under the circumstances, we are of opinion that the judgment of the Circuit court should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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40782

LEO P. RATKOWSKI et al.,  
Appellees,

v.

CITY OF CHICAGO, a Municipal  
corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

303 I.A. 571

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

During the pendency of this appeal this cause was consolidated with No. 40619. It involves the sole question whether plaintiffs are entitled to the payment of interest on condemnation judgments in their favor. The only distinction between this cause and cause No. 40619 is that in the latter it was stipulated that no protest was made, whereas in this proceeding the complaint alleged that the "demands and request for the payment of same [interest] would not avail the plaintiffs, in that the defendant has at all times, and still does, maintain that it was, and is, not legally liable to pay said moneys to the plaintiffs herein."

The conclusions reached in cause No. 40619, and the reasons therefor, are likewise applicable to this proceeding, the precise question being presented for determination. Therefore, for the reasons given in case No. 40619, the judgments of the circuit court in this case should be affirmed. It is so ordered.

JUDGMENTS AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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Sullivan, P. J. and Johnston, J. L. 1963. Some

40783

SALVATORE GALLACHIO et al.,  
Appellees,  
v.  
CITY OF CHICAGO, a Municipal  
corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

303 I.A. 57<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

During the pendency of this cause on appeal it was consolidated in this court with case No. 40619. This proceeding likewise presents the sole question whether plaintiffs are entitled to recover interest on condemnation judgments against the city, where the principal amount was paid and accepted by plaintiffs without protest.

The conclusions reached in cause No. 40619 and the reasons in support thereof are precisely applicable to this proceeding. Judgments were entered in the circuit court in favor of plaintiffs, and for the reasons given in cause No. 40619 the judgments should be affirmed. It is so ordered.

JUDGMENTS AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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GUS LAMESCH,  
Appellant,

v.

SAM SCHMIDT,  
Appellee.

KATHERINE SCHMIDT,  
Appellee,

v.

GUS LAMESCH,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

303 I.A. 58'

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Gus Lamesch brought suit against Sam Schmidt to recover for personal injuries and property damage sustained in an accident which occurred on North avenue near the Village of Melrose Park, Cook county, Illinois, February 5, 1937. Sam Schmidt filed a counterclaim in that action and while the cause was pending, Katherine Schmidt, wife of Sam Schmidt, brought suit against Lamesch to recover damages for injuries sustained by her in the same accident. Thereafter, on motion of Katherine Schmidt her case was consolidated with that of Gus Lamesch v. Sam Schmidt, and the two actions were tried as one before the court without a jury, resulting in the following findings and judgments: In Lamesch v. Schmidt, the court found against plaintiff Lamesch and entered judgment against him for costs. On the counterclaim of the defendant, Sam Schmidt, the court found for the plaintiff, Lamesch, and in the case of Katherine Schmidt v. Lamesch, the court found the issues for Katherine Schmidt, assessed her damages in the sum of \$2,750 and entered judgment accordingly. Lamesch prosecutes this appeal from the finding and judgment for costs entered against him in his action against Sam Schmidt, and from the judgment

GUS LAMMSON,

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for \$2,750 and costs entered against him in the suit brought by Katherine Schmidt.

The accident occurred at 8:30 in the evening on a foggy, misty night. At the site of the accident North avenue runs in an easterly and westerly direction along the north boundary line of the Village of Melrose Park, there being no intersecting streets in the immediate vicinity. The highway is constructed of concrete, has four ten foot traffic lanes, two for east bound and two for west bound traffic, with a dirt parkway separating them. To the north of the west bound traffic lane there is a dirt shoulder, varying in width from three to seven feet, and a ditch running parallel with the highway immediately to the north.

Lamesch was engaged in the garage and towing business in the Village of Maywood, and on the night of February 5, 1937, he received a call to go to North avenue just west of River road to tow or pull a car out of the ditch. Upon his arrival he found an automobile in the mud, to the north of the highway. He hooked a 35 foot chain to this automobile and pulled it in a westerly direction onto the pavement, after which the car proceeded on its way. This operation consumed only a few minutes. Lamesch's tow truck then started in a westerly direction on North avenue to return to the garage, but after going a few feet the chain, which was hooked to the hoist, became unfastened and dragged along the pavement. Lamesch thereupon pulled his truck onto the shoulder north of the road, leaving two or three feet of the left side of the truck on the pavement. The shoulder of the road was wet and soft, and he testified that he parked as far to the right as he safely could. Lamesch then stepped to the left running board, while his helper went to the rear of the truck. They had just completed hooking up and tightening the hoist when a Ford automobile, driven by Sam Schmidt, with his wife sitting beside him in the front seat, struck the truck from the rear, smashing the right front fender, right hand lamp, and injuring the radiator and grille of the Ford car. Lamesch was thrown from the running board of his

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truck and injured, as was Mrs. Schmidt, who sat beside her husband in the front seat of the Ford car.

Lamesch's two truck, weighing about 3,000 pounds, had a hoist constructed on the back extending from the rear end, which was operated by means of a pulley. There was a spotlight about six or seven inches in diameter on top of the hoist, and three electric red lights, in addition to the regular red tail light on the rear frame of the truck. The front of Lamesch's truck had the usual headlights, with three green lights on the top of the frame. All these lights, both front and rear, were burning at the time of the accident.

Lamesch's helper on the truck was a high school student, named Gordon Hanson, who testified that after pulling the Chevrolet car out of the ditch on the north side of the road the tow chain became loose and they stopped to hoist it up; that in so doing they pulled out onto the shoulder; that all the lights were burning; that after they had fastened the chain they were about to start when he saw the headlights of the Schmidt car coming, at a rate of speed which he estimated at 45 miles an hour, and that he jumped into the ditch to avoid being injured. He also said that after the accident all the lights except the spotlight upon the top of the hoist were still burning on the tow truck, the spotlight having been broken in the collision. He said that the shoulders of the road were muddy, so that it would not have been safe to park entirely on the shoulder, and that after the accident he heard Katherine Schmidt say to her husband that he was going too fast.

Three high school students, Jack Mack, Robert Storey and Robert Pyne, testifying on behalf of Lamesch, stated that they were riding in a westerly direction on North avenue, that it was quite foggy and misty, that just prior to the accident a Ford car passed them; that they were driving about 35 miles an hour and estimated the speed of the Schmidt car at about 45 miles an hour; that shortly thereafter they heard a bang and when they came to the scene of the accident they observed that Schmidt's car had run into the tow truck. John Mack testified that he

truck and injured, as well as the driver, who was killed. The truck was in the front seat of the Ford car.

Witnesses who were present at the scene of the accident testified that the Ford car was traveling in the westward direction on North Avenue, and that it was struck by the truck from the rear. The truck was traveling in the eastward direction on North Avenue, and that it was struck by the Ford car from the front.

The Ford car was traveling at a speed of about 35 miles an hour at the time of the accident, and the truck was traveling at a speed of about 45 miles an hour. The truck was struck by the Ford car from the front, and the truck was thrown into the air and landed on the ground.

The driver of the Ford car was killed, and the driver of the truck was injured. The truck was damaged, and the Ford car was damaged. The accident occurred on North Avenue, and the scene of the accident was observed by witnesses.

Schmidt's car had run into the tow truck. John Mack testified that he saw the accident, and that he saw the Ford car strike the truck. He also testified that he saw the truck strike the Ford car, and that he saw the truck throw the Ford car into the air.

Three high school students, who were present at the scene of the accident, testified that they saw the Ford car strike the truck. They also testified that they saw the truck strike the Ford car, and that they saw the truck throw the Ford car into the air.

Pyne, testifying on behalf of the Ford car, testified that he saw the Ford car strike the truck. He also testified that he saw the truck strike the Ford car, and that he saw the truck throw the Ford car into the air.

Of the Ford car, he testified that he saw the Ford car strike the truck. He also testified that he saw the truck strike the Ford car, and that he saw the truck throw the Ford car into the air.

heard Katherine Schmidt say to her husband, "Daddy! Daddy! Why were you driving so fast?" Robert Storey stated that as they approached the scene of the accident he heard Lamesch say to defendant, Sam Schmidt, "What is the matter with you? Didn't you see my lights? You were going too fast," and that he heard Katherine Schmidt say to her husband, "Daddy! You were going too fast." Robert Pyne's testimony was substantially to the same effect. Schmidt and his wife denied that any such conversations took place.

James Bronge, offered as a witness by Lamesch, testified that he was a police officer in Melrose Park and came to the scene of the accident with another officer, named Leonard; that he saw the tow truck standing, with two wheels on the concrete and two wheels off, away over to the north side of the highway, with the Schmidt car two or two and one-half feet behind the truck; that the truck had three red lights on the bumper, a tail light and a light on the hoist which had been broken; that there was a car with three or four boys over in the parkway, which was evidently the car occupied by Mack, Storey and Pyne; that there was a seven foot shoulder, with a lot of mud, and although it was foggy you could see forty or fifty feet away, and that as they approached the scene of the accident, they could see the red lights on the truck forty or fifty feet before they arrived at the scene of the accident. Bronge also stated that when he saw Schmidt at the police station he noticed he had been drinking and that there was an odor of whiskey or alcohol in the front seat of his car.

Officer Leonard, who accompanied Bronge, stated that when they arrived he found the tow truck on the north side of the highway, with the two left wheels on the concrete and the other wheels off the pavement; that the truck had nine lights, four red lights on the back and three green lights in addition to the two headlights in front. He also stated that a broken whiskey bottle was found in Schmidt's car.

Katherine Schmidt testified that she was riding in the front seat of the Ford car with her husband, and that the automobile belonged to them and was used as a family car, for family purposes. On the





evening of the accident she and her husband had gone to Chicago to engage a paperhanger, and on their way back they purchased some groceries; that although it was a foggy and misty evening, she could see objects from 30 to 40 feet ahead, but that she at no time saw the truck until the impact. She testified that they had been travelling at the rate of 15 or 20 miles an hour; that just before the accident she saw a big light ahead of her which seemed far away, and that ~~when~~ they struck the truck she observed the tail light. Mrs. Schmidt had been looking through the windshield for the purpose of calling her husband's attention to any objects that might appear ahead of them in the highway, but she at no time called her husband's attention to the light which she said that she observed.

Sam Schmidt's testimony was substantially to the same effect. He stated, however, that he first noticed the truck when he saw a light ahead of him, fifty or sixty feet away, and that the truck was then standing still in the outer lane of the highway. He was familiar with the road and knew that there were two lanes for west bound traffic. There was no obstruction between the truck and the portion of the highway to the south thereof, and the inner lane of the highway was clear and open. On cross-examination Mr. Schmidt testified that at the rate of speed he was going just prior to the collision, he could have stopped his car within ten or twelve feet. He made no attempt to turn into the inner lane until immediately before the impact, and he saw the tail light on the truck, which was still burning after the accident.

Under these circumstances, it is urged that the findings and judgments of the trial court are against the manifest weight of the evidence; that Katherine Schmidt was guilty of contributory negligence, because, although she was watching through the windshield for possible obstructions on the highway and saw the spotlight on Lamesch's truck, she failed to call her husband's attention thereto; that Lamesch was not guilty of negligence, notwithstanding the provisions of section 185, chap. 95-1/2 of the Motor Vehicle law (Illinois Rev. Stats. 1937), because the proximate cause of the accident was the negligence of the



Schmidts in failing to observe the lights on the back of Lamesch's truck, and also because of the speed at which they were driving. Since the cause will in all likelihood be retried, we refrain from commenting too extensively on the evidence adduced upon the hearing. The fact remains, however, that according to the undisputed evidence Lamesch's truck was well lighted, substantially all the witnesses agree that he was parked well to the right of the highway, leaving some sixteen or seventeen feet to the south of his truck for passing, that the inner lane of the west highway was clear, so that Schmidt could have passed the truck to the left without any difficulty, if he had seen it; and there is also the testimony of several disinterested witnesses that Schmidt was driving at the rate of 40 to 45 miles an hour on an evening when, according to his own testimony, he could not see objects ahead of him for a distance greater than fifty to sixty feet. As to Katherine Schmidt, the evidence discloses that she had assumed the responsibility of looking through the windshield to discern any possible objects ahead, and that she did see the white spotlight on Lamesch's truck; nevertheless, she failed to call her husband's attention thereto. Under this state of the record, we have reached the conclusion that the findings of the court are manifestly against the weight of the evidence, and therefore the judgments in the case of Lamesch v. Schmidt, against Lamesch for costs and against Schmidt on his counterclaim, as well as the judgment in favor of Katherine Schmidt for \$2,750 against Lamesch, are all reversed and the causes remanded to the Circuit court for a new trial.

It is further urged on behalf of Lamesch that the trial court erred in consolidating the causes. However, since all of the claims grew out of the same accident, we think the court was justified under sec. 51, par. 175 of the Civil Practice act (Ill. Rev. Stats., 1937, chap. 110) and under the circumstances of these cases, in entering the order of consolidation. None of the parties could be prejudiced by such a proceeding. The claims were so closely connected and related to the same subject matter that they ought to be consolidated and tried



together.

JUDGMENT IN FAVOR OF SCHMIDT IN THE CASE OF  
LAMESCH V. SCHMIDT REVERSED AND THE CAUSE  
REMANDED FOR A NEW TRIAL.

JUDGMENT IN FAVOR OF LAMESCH IN THE COUNTERCLAIM  
OF SCHMIDT V. LAMESCH REVERSED AND THE CAUSE  
REMANDED FOR A NEW TRIAL.

JUDGMENT IN FAVOR OF KATHERINE SCHMIDT IN THE CASE  
OF KATHERINE SCHMIDT V. LAMESCH REVERSED AND THE  
CAUSE REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Scanlan, J., concur.

together.

THESE ARE THE RESULTS OF THE  
RESEARCHES OF THE  
INSTITUTE OF THE  
FRENCH ACADEMY OF SCIENCES

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RESEARCHES OF THE  
INSTITUTE OF THE  
FRENCH ACADEMY OF SCIENCES

40803

JOHN H. GATELY,  
Appellee,

v.

LOUISE WILKE,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

303 T.A. 58

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John H. Gately, an attorney at the Chicago bar, brought suit against Louise Wilke, who was the principal beneficiary of her mother's estate, to recover the sum of \$1,000, a balance alleged to be due under an oral contract for legal services rendered on behalf of defendant. The cause was tried by the court and a jury, resulting in a verdict and judgment for \$500, from which defendant appeals.

From the essential facts it appears that Louise Wilke was executrix and principal beneficiary of the estate of Mary ilke, deceased. Collins, Holloway & Kelly, who were the attorneys for the estate in the Probate court, had filed in the County court a schedule of the assets of the estate in connection with the determination of the inheritance tax. Included among the assets was a parcel of land on Monroe street in Chicago improved with an old building upon which the appraisers had placed a tentative valuation of approximately \$100,000, and defendant was apprehensive lest the appraisal on this property might be increased in excess of what she thought it was really worth. She was also concerned because her attorneys had advised her that the inheritance tax on the estate would amount to some \$12,000 or \$13,000, by reason of a certain provision in her mother's will. When she first met plaintiff in April, 1938, she told him of the problems confronting her, and asked him if he could do anything about handling these inheritance tax matters. Plaintiff told her that he could not answer that question without first examining the provisions of the will and inspecting the property, and that





he would look into the matter for her, if she so desired, provided, however, that she could get the consent of the attorneys for the estate and their withdrawal from this phase of the administration of the estate.

At a subsequent meeting between the parties in plaintiff's office Miss Wilke made inquiry as to plaintiff's charges for services, and he told her that the usual fee was one-third of the amounts saved. Defendant demurred to this and said that she did not like contingent fees, and would appreciate it if counsel would suggest a definite amount. According to plaintiff's testimony it was then agreed that if he could maintain the valuation as set up by the appraisers for the inheritance tax board at \$100,000, he would charge a fee of \$1,000, and that in the event he could obtain a ruling under sec. 25 of the inheritance tax statute, in favor of her estate, he would charge another \$1,000. Following this conversation defendant sent to plaintiff a copy of the will and other papers which he examined and with reference to which he made certain suggestions. Subsequently he inspected the building on Monroe street, checked up on the valuations, examined the will and also ascertained that there was then pending in the Supreme court of Illinois the case of People v. Metropolitan Trust Company, which was afterward reported in 369 Ill. 84, involving the identical point with reference to sec. 25 of the inheritance tax law which gave rise to the apprehension on defendant's part that she might be required to pay \$12,000 or \$13,000 in inheritance taxes.

After inspecting the premises on Monroe street, plaintiff had conferences with the appraisers which ultimately resulted in an agreement on their part that the appraisal submitted by Collins, Holloway & Kelly was fair, and as a result of which the appraisers agreed that the \$100,000 amount would be a fair valuation upon the property, and it was accordingly appraised at that figure. Plaintiff reported this to Miss Wilke and testified that she told him he "had done a fine job, and hoped that I would have as much success with section 25." Plaintiff thereupon



sent Miss Wilke a bill for services rendered in connection with this first phase of his services in the sum of \$1,000 which was paid by her.

The controversy arises over the services rendered by plaintiff in connection with procuring a ruling from the inheritance tax board relative to sec. 25 of the statute. Plaintiff had been a part time <sup>'s</sup> employee of the attorney general's office for several years and under his arrangement with that office he was permitted to practice law on his own account. He devoted substantially one-half of his time to the attorney general's office. He had, some two or three years prior to that time, been assigned to the inheritance tax department and was familiar with that procedure. At the time in question, however, he no longer had any connection with the inheritance tax department but was "doing certiorari work from the Liquor Commission, the Board of Registration and Education."

The immediate problem relating to the ruling under sec. 25 of the statute arose out of the provision in Mary Wilke's will which contained a power of appointment after a life estate which might result in a bequest of the estate to a stranger, and in that event there would have been no exemption from the inheritance and the estate would have been subject to a tax of approximately 20%. This would have amounted to some \$12,000 to \$13,000 as against approximately \$700 if a favorable construction could be secured under sec. 25 of the statute.

The case came up for hearing before Miss Hoffman, one of the examiners in the inheritance tax department of the attorney general's office in May, 1938. Defendant was present and certain amendments were made in the schedule, setting up some \$5,000 in a bank account which had not been included by the attorneys for the estate. When the question arose as to the construction of sec. 25 of the statute, plaintiff called Miss Hoffman's attention to the fact that there was then pending in the Supreme court of Illinois the case of People v.



Metropolitan Trust Company involving similar facts, and plaintiff persuaded the examiner to hold off her ruling until the Supreme court had decided that case. After the opinion in the Metropolitan case was filed, plaintiff made another appointment with the examiner and spent substantially the whole afternoon in arguing the effect of the recent decision as applicable to the Wilke estate. Miss Hoffman was of the opinion, however, that the decision did not apply to the circumstances of the Wilke estate and therefore another appointment was made at which plaintiff produced further authority and finally succeeded in securing a ruling favorable to the estate. He thereupon notified defendant and the attorneys for the estate, with the result that Miss Wilke paid the tax based on the conclusions reached as the result of plaintiff's efforts, and he testified that both defendant and her attorneys expressed satisfaction with the results attained. Some time thereafter plaintiff sent Miss Wilke another bill for \$1,000, and upon her failure to pay the same had a telephone conversation with her in which she said "I am not going to pay<sup>any</sup> more." Thereupon this suit was instituted to recover the balance of \$1,000 claimed to be due plaintiff.

The principal ground urged for reversal is that plaintiff represented adverse interests before the inheritance tax board and is not entitled to claim fees from the defendant. Defendant complains of the refusal of the trial court to give certain instructions offered by her, which are set out in full as follows: "17. The Court instructs the jury that if the jury finds that the plaintiff was representing adverse interests while engaged in the purported services for the defendant, you should find the defendant not guilty."

"18. The jury are instructed that if you find that the State Inheritance Tax Department of the State of Illinois is a division of the Attorney General's office of the State of Illinois, that the plaintiff at the time of the purported services for which he claims herein, was employed as an Assistant Attorney general for the State



of Illinois and connected with said office as a public official of the State of Illinois, and that the plaintiff was acting for the defendant in a case before the State Inheritance Tax Department of the State of Illinois in attempting to reduce the claim of the State of Illinois for inheritance tax, that in that event, the plaintiff was in a position of representing adverse interests, and his claim for services is unenforceable, and in that event, you should find the defendant not guilty." These instructions fail to take into account the important circumstance that under the undisputed evidence plaintiff was a part time employee in the attorney general's office, to which he devoted substantially only half of his time, and that he had the privilege, through an understanding with the attorney general of practicing law in his own behalf during the course of his employment, and that at the particular time and for some two or three years prior thereto he had been assigned to other duties which had no relation to inheritance tax matters.

Numerous cases are cited pro and con dealing with questions involving the representation of adverse interests by attorneys, but none of these cases is pertinent under the peculiar facts of this case. It may be conceded to be the general rule that an attorney may not represent adverse interests, but after a careful examination of the evidence we have reached the conclusion that plaintiff did nothing which would subject him to the charge made. His services consisted principally in calling the examiner's attention to the fact that a similar question was then pending in the Supreme court of Illinois, and in prevailing upon the examiner to defer a ruling until that case was decided and in subsequently arguing before the examiner and convincing her that the facts in the Wilke case were similar and applicable to the Metropolitan Trust litigation, and that sec. 25 of the Inheritance Tax act did not apply. In this capacity we can see nothing inconsistent or adverse in his duties as between the attorney general's office and the interests of his client. He was instrumental in effecting a saving of \$10,000 or \$12,000, and was entitled to be





compensated for his services.

It is also urged that the verdict of \$500 was a compromise verdict; that neither the pleadings nor the proof tend to sustain it; that either the plaintiff was entitled to \$1,000, or nothing, and that since no middle ground theory is conceivable a compromise verdict is unjustified. The gravamen of the complaint is that while plaintiff might have been entitled to a verdict and judgment, the same should have been \$1,000 and not \$500. It has been held under similar circumstances that a party is not allowed to assign error as to a finding which is for his benefit and not against his interest, and that if the jury gives the plaintiff less than he is entitled to recover the error is one of which plaintiff alone can complain. (Heyman v. Heyman, 210 Ill. 524; Reid v. Houston, 20 Ill. App. 48.)

Defendant also contends that the verdict was manifestly against the weight of the evidence. We have already indicated that plaintiff was retained by defendant under an oral agreement as to the contents of which there was some conflict. Both versions of the conversations had between the parties were submitted to the jury and upon the evidence adduced we believe the jury was justified in finding that such a contract as plaintiff claimed had been made, and it is reasonably clear that he rendered the services for which he had been engaged with eminently satisfactory results.

For the reasons given the judgment of the Municipal court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

comparisons for the following:

Salisbury, J. H., 1913, p. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843

40847

FRED HOLY,  
Appellee,  
v.  
WINIFRED HITCHCOCK,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

303 I.A. 59

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant, Winifred Hitchcock, appeals from a judgment for \$390 entered in the Municipal court of Chicago in favor of Fred Holy, plaintiff herein, for legal services rendered by plaintiff to defendant in a chancery proceeding in the Circuit court, entitled Wiley Hitchcock v. Winifred Hitchcock, No. 34-C 1431.

This cause has been tried three times. In the first instance a jury returned a verdict of \$500 in favor of plaintiff. The judgment entered on the verdict was set aside by this court because of prejudicial matters injected into the trial by counsel. The second trial resulted in a like verdict for \$500, and the judgment entered on that verdict was also reversed and the cause remanded. In the proceeding now before us the jury returned a verdict in favor of plaintiff for \$390 on which judgment was entered, and defendant appeals for the third time.

The facts essential to a consideration of the issues involved disclosed that Wiley Hitchcock and Winifred Hitchcock were husband and wife. In 1934 the husband brought suit against his wife for the dissolution of a trust fund consisting of cash held in a safe deposit box under an agreement between them which provided that upon the death of either the survivor would receive the fund, or in the event that both parties should die the fund would go to their son, Aaron. The plaintiff in that proceeding charged that the purported agreement impressing the funds on deposit with a trust contained a forgery of his signature.

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of his signature.

Impressing the funds on deposit with a trust contained a forgery.

The plaintiff in that proceeding charged that the purported agreement that both parties should die the same would go to their son, Aaron.

death of either the survivor would receive the fund, or in the event box under an agreement between them which provided that upon the dissolution of a trust fund which was held in a safe deposit and wife. In 1944 a certain amount was paid to the wife for the disclosed fund in 1944. The fund was then withdrawn.

The fund was then withdrawn in 1944 and the fund was withdrawn.

third time.

1944 on which the fund was withdrawn.

now a large sum of money was paid to the wife for the fund.

verities and the fund was then withdrawn.

received in 1944 and the fund was then withdrawn.

only a small amount of money was paid to the wife for the fund.

entered on the fund was then withdrawn.

a trust fund was then withdrawn.

which was then withdrawn.

1944 on which the fund was withdrawn.

third time.

The fund was then withdrawn.

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dissolution of a trust fund which was held in a safe deposit

box under an agreement between them which provided that upon the

death of either the survivor would receive the fund, or in the event

that both parties should die the same would go to their son, Aaron.

The plaintiff in that proceeding charged that the purported agreement

impressing the funds on deposit with a trust contained a forgery.

During the pendency of the suit Clark B. Richie, who had been retained by defendant and continued in the case for several months, withdrew before the case was reached for trial in October, 1934, for the reason, as he stated, that he and the defendant were unable to agree upon the proper methods to pursue in defending the cause. Defendant assigns other reasons for Mr. Richie's withdrawal, but in any event it is clear that before the case came to trial she retained Fred Holy, plaintiff herein. There is considerable conflict in the evidence as to the terms of the oral agreement under which plaintiff was retained to represent Mrs. Hitchcock, but the respective contentions of the parties have been submitted to three juries, all of which found adversely to the defendant and need not be repeated here.

After plaintiff had filed his appearance and appeared in the Circuit court on October 30, 1934, ready for trial, some evidence was taken in the forenoon session, and the court was then adjourned until two p.m. Further evidence was adduced upon the hearing that afternoon, and the cause was then continued until November 6, 1934, to accommodate certain parties and witnesses who were engaged in school work under the jurisdiction of the board of education. Following the adjournment on October 30, defendant requested plaintiff to withdraw from the case and thereafter served him with notice of his discharge. When the trial was resumed November 6 plaintiff endeavored to withdraw his appearance, but the chancellor upon learning that defendant had not made arrangements for other counsel in his place refused to allow plaintiff to withdraw until other counsel had been obtained. However, the court did permit defendant to conduct her own defense, but insisted that plaintiff be present in court and assist in the trial until some other attorney appeared for her. Defendant evidently made no effort to obtain new counsel until long after the court had decided the issues on December 17, 1934. In the interim and before the decision was made, plaintiff filed a brief of authorities and argument in support thereof, which was considered by the chancellor and findings made in favor of the defendant awarding her some \$5,500 in the pending litigation.



The defense interposed by defendant is twofold: (1) she claims that she discharged plaintiff before the case was completed and that he is not entitled to any compensation for services rendered subsequent to his discharge, notwithstanding the fact that the court refused to allow him to withdraw and required his attendance in court until other counsel was obtained; and (2) that plaintiff is not entitled to any compensation because of an alleged agreement between her and plaintiff wherein he represented that he would collect his fees from the husband, under the provisions of the Family Expense statute. Evidence in support of both these theories of defense was submitted to the jury. Plaintiff vehemently denied that he had agreed to collect his fees from Mr. Hitchcock and thereby absolve defendant from bearing the costs and expenses of the litigation. All three juries passed upon these questions and determined them adversely to Mrs. Hitchcock.

In connection with the two defenses interposed, it is urged that the court erred in refusing to give certain instructions tendered by defendant with reference to plaintiff's right to recover for services<sup>rendered</sup>/subsequent to his discharge, and also relating to the other theory of defense. We think it unnecessary to enter into a detailed discussion of the several instructions refused by the court, because it appears from the record that in the series of instructions which the court gave the jury was fully charged with reference to both theories of defense, and it would have been mere surplusage to have given the instructions tendered by defendant. Moreover, some of the instructions were objectionable because they emphasized certain items of evidence and would have tended to mislead the jury.

In both of the former appeals it was charged that plaintiff's counsel injected prejudicial matter into the trial. While this was undoubtedly true in the first trial, and to some extent in the second, most of the matters were eliminated from the third trial. In all three hearings there were questions and remarks which had no place in the trial, but we have concluded upon a careful examination of the record that the instances pointed out by defendant in the last





trial were not so prejudicial as to have induced the verdict. The simple fact remains that defendant retained plaintiff and that he rendered legal services on her behalf for which he was entitled to be paid, and the courts have uniformly held that where no other verdict could have been arrived at by the jury it will not be disturbed for such remarks as are complained of here.

The remaining ground urged for reversal is that the verdict was manifestly against the weight of the evidence. The record is clear, however, that plaintiff spent considerable time in preparation of the case, and according to his testimony was present in court on at least eight occasions in the actual trial. He also stated that he had spent two days examining authorities, and had various consultations with defendant prior to trial. In all he spent some thirty-two hours in defendant's behalf. Defendant denies a considerable part of this service, and claims that some of it was rendered after plaintiff had been discharged by her, but all these matters were submitted to the jury under proper instructions, and we are satisfied from an examination of the record that the verdict was justified under the evidence adduced upon the trial.

The cause having been tried three times and all three juries having found in favor of plaintiff the litigation ought to be brought to a close. We find no convincing reason for reversal and therefore the judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



40869

ANNA TEMPLE,  
Appellee,

v.

CITY OF CHICAGO, a  
municipal corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

3031.A. 59

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Anna Temple, brought suit against the City of Chicago to recover damages for personal injuries sustained by her while walking on the sidewalk in front of 1638 S. Ridgeway avenue, occasioned, as alleged in the complaint, by the negligence of defendant in maintaining the sidewalk in a broken and unsafe condition. The jury assessed her damages at \$2,000 and judgment was entered on the verdict, from which the city appeals.

The accident occurred September 17, 1937, at about 8:30 a.m. Plaintiff, who was 66 years of age at the time of the trial, had gone to a market on 16th street and was returning to her home at 1648 South Ridgeway avenue, along the west side of the street. She was the only eyewitness to the accident and her testimony as to the manner in which it occurred appears from the abstract as follows: "About half past eight in the morning, I came from 16th street from the butcher shop and fish market. I walked down 16th street. After I left Sixteenth street I went on Ridgeway, south. I went on the west side of Ridgeway avenue. Well, when I came to the lot where I fell down I couldn't pick myself up anymore. The number of the lot is 1638, I think, South Ridgeway Avenue. \*\*\* I went to put my foot - my foot caught ahold of a piece of rock and I fell down. \*\*\* I was carrying two large bundles when I fell. I was carrying them in both hands."

On cross-examination she testified as follows:

"I live four houses away from where I fell. \*\*\* That day that I left my house when I went shopping I walked on the east side of the

ANNA TRIMBLE  
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MR. TRIMBLE

On the day of the accident, I was walking on the east side of the  
Highway, and I was carrying two large bundles when I fell.  
I was carrying them in both hands.

The accident occurred on the highway, and I was walking on the east side of the  
Highway, and I was carrying two large bundles when I fell.  
I was carrying them in both hands.

On cross-examination she testified as follows:  
"I live four houses away from where I fell. \*\*\* That day that  
I left my house when I went shopping I walked on the east side of the

street. I did not have much occasion to walk over on the west side of the street before. I lived at that particular address six years, but I always used to walk on the east side of the street because my shopping is on the east side, so I always used to walk over from my house on the east side of the sidewalk. \*\*\* When I fell I was walking near the fence of that vacant lot there. That would have been to my right as I was walking south. The day was nice and clear. As I was walking south, I was looking ahead but the sun was in my eyes and I couldn't see very good. \*\*\* A rock on the sidewalk got hold of my foot and I just fell. It was from the sidewalk, a little stone. I did not step on the stone, but my foot got hold of it and I couldn't get myself back. This rock was small, very small, about this size [indicating]. My heel got hold of the rock, with the heel. I didn't step on it but it got hold of my heel and that is why I fell. That rock was on the sidewalk there. \*\*\* I don't know how long the sidewalk was broke. I couldn't tell you because I didn't pay any attention. I didn't even know if it was broke because I never paid any attention to it."

She also testified on recross-examination that "I didn't look at the sidewalk, I just passed the way with my head up. Q. Weren't you looking where you were going as you were walking? A. No."

The city first contends that there is a total absence of proof to establish actual or constructive notice to the city of the existence of the condition which caused plaintiff's injury, and that for that reason plaintiff's action must fail and judgment should be entered in favor of defendant. The argument under this point is predicated upon a construction which the city places upon the plaintiff's testimony, namely, that she fell or tripped on a stone or rock which had been on the sidewalk, but that no showing was made as to whether the stone had been there for any considerable length of time, so that the city could have had notice or knowledge thereof. Plaintiff was 66 years of age and testified that she could not read English, and it is evident from an examination of the record that she was not very apt in the expressions used in describing the manner in which the



accident occurred. Two exhibits were introduced and received in evidence, however, from which it appears that the sidewalk was in a very bad state of disrepair at this particular place. The concrete is cracked and broken in places, to the extent of several feet in length and approximately one or two feet in width. There are three places in front of this lot along the fence where plaintiff was walking where the concrete is entirely dislodged, leaving holes in the sidewalk with jagged edges along the sides, in addition to several cracks running north and south over the entire length of the concrete blocks, which can be estimated from the photograph to be approximately 4 feet in length. The photographer who took the photographs introduced in evidence testified that this condition had existed for about a year. It is a reflection on the city that such a dangerous condition of disrepair should have been allowed to exist for so long a time. From the evidence adduced by plaintiff we think the jury may well have interpreted her testimony to mean that her heel caught on a rock or stone or piece of concrete on the sidewalk. It is apparent from the photograph that there were many jagged pieces of concrete along the sides of the holes left where the material of which the sidewalk is made had been dislodged. She testified on more than one occasion that she did not step on a stone, but, as she expressed it, that "my foot caught ahold of a piece of rock and I fell down \*\*\* A rock on the sidewalk got hold of my foot and I just fell. \*\*\* I did not step on the stone, but my foot got hold of it and I couldn't get myself back. \*\*\* My heel got hold of the rock with the heel. I didn't step on it but it got hold of my heel, and that is why I fell."

It has long been the rule in this State that the jury is justified in taking into consideration all the competent evidence adduced by a party, and under the following decisions plaintiff was entitled to have her testimony interpreted in the light most favorable to her, without placing any strained construction thereon. (Alden v. Coultrip, 275 Ill. App. 306; Pienta v. Chicago City Ry. Co., 284 Ill. 246.) Defendant singles out a statement by plaintiff that her fall was caused by a loose stone, and uses that as a basis for the several

accident occurred. Two exhibits were introduced and received in evi-

dence, however, from which it is said that the accident occurred in a very

bad state of disrepair to this bridge that it was in a very

cracked and broken in places, the bridge was in a very

and approximately one or two feet in width, the bridge was in

front of this location, the bridge was in a very

concrete is made of blocks, the bridge was in a very

bridge was in a very

and about over the bridge, the bridge was in a very

estimated from the bridge, the bridge was in a very

two or three feet in width, the bridge was in a very

that this bridge was in a very

the city was in a very

allowed to exist for a long time, the bridge was in a very

that we have had many accidents, the bridge was in a very

that has been brought out, the bridge was in a very

walk, it is estimated that the bridge was in a very

pieces of concrete, the bridge was in a very

of which the bridge was in a very

than one occasion, the bridge was in a very

it, that my foot was in a very

rock on the sidewalk, the bridge was in a very

step on the step, the bridge was in a very

back. \*\*\* My foot got into it and was in a very

on it but it got into my foot, the bridge was in a very

it has long been the rule in this city, the bridge was in a very

justified in taking into consideration all the facts and evidence

advised by a party, and under the following, a witness plaintiff was

entitled to have her testimony interpreted in the light most favorable

to her, without placing any strained construction thereon. (Alben v.

Condit, 275 Ill. App. 306; Plante v. Chicago City Ry. Co., 184 Ill.

246.) Defendant singles out a statement by plaintiff that her fall

was caused by a loose stone, and uses that as a basis for the several



propositions upon which it relies for reversal, but we think that taking all the evidence together the jury was justified, without placing a strained construction on her testimony, in finding that she fell as the result of one of the jagged edges or pieces of the broken sidewalk which are so readily discernible in the photograph introduced in evidence.

It is next urged that the evidence fails to show that plaintiff was in the exercise of due care and caution for her own safety at the time of the injury. This argument is predicated upon her statement that she was not looking where she was walking, and that "I just passed the way with my head up." She testified, however, that she was carrying two large bundles from the market, that the glare of the sun made her squint as she walked along, and that she did not see any defects in the sidewalk. It was held in Graham v. City, 346 Ill. 638, at p. 640, that "A pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel. To hold a person absolutely bound to keep his eyes fixed upon a sidewalk in search of defects and dangerous places would be to establish a manifestly unreasonable and impracticable rule." (Quoting City of Chicago v. Babcock, 143 Ill. 358.) And in Caruso v. City of Chicago, 278 Ill. App. 247, the court (quoting from Brennan v. City of Streator, 256 Ill. 468) said that "Its (the City's) duty is only to exercise ordinary care to keep its streets and sidewalks reasonably safe for persons using them who are themselves exercising ordinary care." Considering plaintiff's age, the fact that she was carrying two large bundles, and that she was obliged to "squint" because of the glare of the sun, we think the jury was justified in finding that she was in the exercise of reasonable care; and this was one of the questions upon which the jury was required to exercise its judgment.

Moreover, the jury was properly instructed as to the law by instructions offered by defendant and given by the court. They were apprised of the necessary elements required to be proved by plaintiff and were charged with the degree of care that plaintiff was required to use; also with the question as to whether plaintiff had knowledge of the defective condition, and if so whether she used due care to avoid being injured. One instruction dealt with the duty of the city to keep the

propositions upon which it relied for reversal, but no child was calling  
all the evidence together has been rejected, when it is shown  
strained construction on the testimony, and that the child is the  
result of one of the legal errors or of the errors in the trial  
are so readily discernible in the testimony that no child in any way  
it is held that a child is not a child in any way.  
was in the exercise of her duty, and that the child was not  
time of the injury. It is held that the child was not a child  
she was not looking at the child, and that the child was not  
way with my head up." It is held that the child was not a child  
large number of children, and that the child was not a child  
as the witness stated, and that the child was not a child  
walk. It is held that the child was not a child in any way.  
pedestrian upon a sidewalk, and that the child was not a child  
duty safe condition to be in, and that the child was not a child  
keep his eyes fixed upon the child, and that the child was not a child  
placed with the child, and that the child was not a child  
rule." (Nothing is said of the child's duty, and that the child was not a child  
Garnes v. City of St. Louis, 100 Mo. 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

streets reasonably safe for travel. No complaint is made of any of these instructions, nor of the manner in which the case was tried, and we would not be justified in disturbing the jury's verdict upon questions of fact, especially since it is not argued by the city that the verdict is against the manifest weight of the evidence.

The remaining contention advanced by the city is that there is a fatal variance between the proof and the allegations in the complaint. It is argued that although the complaint alleges that the sidewalk was in a broken and unsafe condition, that nevertheless plaintiff failed to testify as to the broken condition which existed. However, we find that exhibits 8 and 9, photographs of the sidewalk which were received in evidence, undeniably prove that the sidewalk was in a very bad state of disrepair, and, as hereinbefore stated, contained holes and cracks extending the full length of the lot in front of which plaintiff was injured. Although plaintiff did not expressly say that she stepped into any of the holes in the sidewalk, we think the jury was justified in interpreting her testimony to mean that her heel was caught along one of the jagged edges or loose pieces of concrete.

The size of the verdict is not assailed and from all that appears of record the case was fairly tried. We find no convincing reason why the judgment should be reversed and think the court properly denied defendant's motion for a directed verdict. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



40898

JACK REITER,  
Appellee,

v.

CITY OF CHICAGO, a  
municipal corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

303 L.A. 60

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Jack Reiter, brought suit against the City of Chicago and William Zelasky Company, to recover damages for personal injuries sustained by him while walking along an alley in the City of Chicago, part of which was in a state of disrepair. The jury returned a verdict in his favor for \$750, upon which the court entered judgment against the city, William Zelasky Company having been dismissed from the case during the course of the trial on plaintiff's motion. The city appeals from the judgment entered. Plaintiff has filed no brief on appeal.

Reiter, a janitor and unmarried, was employed by William Zelasky Company and Samuel Saperstein. The Zelasky property is located at 2333-41 Addison street and 3547-59 Western avenue. The alley to the east and rear of this property extended north and south from Addison street to Cornelia avenue.

The accident occurred May 20, 1937, at about 7:30 p.m. while it was still light. The Saperstein property was located across the alley from the Zelasky building, and on the evening in question plaintiff came out of the boiler room of the Saperstein building, with the intention, as he stated, of walking to the corner to get something to eat. The alley where the accident occurred had been paved with concrete and was perfectly smooth and safe along the eastern side, from the Saperstein property to the corner. Part of the western side of the alley, however, was badly broken up and had been in a bad state



of disrepair for approximately six months. Reiter testified that he knew this because "I cross the alley a dozen times a day. I knew that one side of the alley was perfectly safe and smooth and clear and that the other side of the alley was defective." Two boys were playing "catch" in the alley at the time, but there is no evidence to indicate that Reiter could not have safely walked along the smooth and clear portion of the alley to the corner; nevertheless, he crossed over to the defective side of the alley, and while walking along turned his ankle and was injured.

It is urged that the court erred in refusing to instruct the jury in favor of defendant at the close of plaintiff's case. From a careful examination of the record it is clear that Reiter was not in the exercise of due care for his own safety. According to his own testimony, he was familiar with the defects in the alley, which had been in a state of disrepair for many months, and had crossed the alley at the place where the accident occurred many times each day, and he could easily have avoided the accident by the use of reasonable care for his own safety by walking along the other side, which was perfectly safe and smooth. Even though the city may have been negligent in allowing the alley to remain in a state of disrepair for so long a time, it should still not be held liable under a clear case showing that plaintiff was not in the exercise of due care for his own safety. The courts of this state have repeatedly held that in the absence of wilful and wanton injury on the part of defendant, the plaintiff cannot recover for personal injuries sustained in an accident unless it appears that he was in the exercise of ordinary care for his own safety. (Illinois Central R. R. Co. v. Oswald, 338 Ill. 270; Wilson v. Illinois Central R. R. Co., 210 Ill. 603; Pollard v. Broadway Central Hotel Corp., 269 Ill. App. 77. In the Oswald case the court said that "a party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." There is no evidence in this case to indicate that Reiter exercised due care for his own safety; in fact the evidence, including





his own testimony, is all to the contrary. Upon this state of the record, it was the duty of the court to direct a verdict in favor of the city and its failure to do so constitutes reversible error.

Other points are raised as ground for reversal, but in view of the conclusion reached it is unnecessary to discuss them. Upon the evidence adduced there can be no legal responsibility resting upon the city to compensate plaintiff for injuries which he could easily have avoided. We are impelled to reverse the judgment entered in the Circuit court and it is so ordered.

JUDGMENT REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

his own testimony, as the only one, is that he saw the  
record, it was the only one, and he saw it at the  
the city and the building of the city, and he saw it  
Other police officers, and he saw it at the  
of the building, and he saw it at the  
the evidence, and he saw it at the  
the city, and he saw it at the  
have evidence, and he saw it at the  
the through, and he saw it at the

Building, and he saw it at the

40717

DR. LAWRENCE M. MARLEY,  
Appellee,

v.

MARY HENZLER and AL HENZLER,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

303 I.A. 73

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A suit by plaintiff, a physician and surgeon, for professional services rendered to Mary Henzler, defendant, wife of Al Henzler, defendant. At the close of all the evidence plaintiff moved the court to instruct the jury to find the issues for plaintiff. The trial court reserved its ruling until after the jury returned its verdict. The jury returned a verdict finding defendants not guilty. Thereupon plaintiff moved the court for judgment non obstante veredicto and the motion was sustained. Judgment was entered in favor of plaintiff and against defendants for the sum of \$200 and costs. Defendants appeal.

The defense filed was as follows: "The defendants say that

1. They have no knowledge whether the plaintiff is a duly licensed and practicing physician and surgeon and further ask strict proof thereof. 2. The defendants deny that the plaintiff is entitled to the sum of \$200.00 or in any sum whatsoever and deny that the plaintiff rendered any services of any value to these defendants. 3. The defendants deny that they promised to pay the said plaintiff the sum of \$200.00 or any sum whatsoever nor did either of the defendants contract to pay the plaintiff any such sum."

The services were rendered to Mary Henzler. The husband was made a defendant under the Family Expense Act of 1937. Plaintiff operated on Mary Henzler and removed an infected appendix and two cysts in the region below the infected appendix, and saw her professionally in connection with her condition a number of times before and after the operation. The verdict of the jury was undoubtedly the result of statements made



by Mrs. Henzler to the effect that plaintiff jerked the bandages off her abdomen and caused the skin to burst and bleed, that there was an infection at the point of the incision and she heard the doctor say to one of the internes, "You should not have used those stitches on a thin person." These statements were made for the purpose of causing the jurors to believe that plaintiff had been guilty of malpractice in his treatment of Mrs. Henzler. No such defense was made in the written defense filed by defendants, and in this court defendants' counsel abandons the malpractice theory and states that malpractice was not a defense to the action.

Defendants contend that "the lower court erred in weighing the evidence on plaintiff's motion for a judgment notwithstanding the verdict." We find no merit in this contention. As we have heretofore stated, the fact that the doctor operated on Mrs. Henzler and saw her professionally before and after the operation is not denied. Dr. Steinbrecher, who assisted in the operation upon Mrs. Henzler, testified that the operation performed by plaintiff "was performed in a safe, skillful and scientific manner, very conservative." He further testified that in his opinion "the charge for the services rendered by Dr. Marley was extremely reasonable considering the operation and all the calls he made previous to the operation, and all the calls he made subsequent to the operation;" that a fee of \$200 was quite reasonable. No witness for defendants testified that the fee was not a reasonable one. In our judgment, the trial court was justified in entering the judgment he did, as no real defense was offered to plaintiff's claim.

Defendants contend that "the court erred in refusing to admit evidence to prove payment." They offered in evidence three statements sent by plaintiff to the husband for professional services rendered to him and which were marked paid. Plaintiff was suing for professional services rendered Mrs. Henzler, and the statements offered were not competent in the present suit. We find no merit in the contention of defendants that the court erred in refusing to admit certain photographs offered by defendants.



Defendants contend that as plaintiff made no motion for a new trial he cannot now question the sufficiency of the evidence to sustain the verdict. Plaintiff's motion for judgment non obstante veredicto was based upon the theory that there was no evidence offered by defendants that tended to rebut plaintiff's case and that therefore there was no issue of fact to submit to the jury.

We find no real merit in this appeal.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.





40751

ELLA BOYLE,  
(Plaintiff) Appellee,

v.

CHESTER E. CLEVELAND and  
DAVID H. JACKSON, Copartners,  
Defendants.

CHESTER E. CLEVELAND,  
(Defendant) Appellant.

APPEAL FROM THE MUNICIPAL  
COURT OF CHICAGO.

3031.A.74'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Ella Boyle sued Chester E. Cleveland and David H. Jackson, copartners, practicing law under the firm name of Cleveland and Jackson. Jackson was not served with summons. The cause, as to Cleveland, defendant, was tried by the court without a jury, the issues were found against him, and plaintiff's damages were assessed at the sum of \$359.25. He appeals from the judgment entered upon the finding.

The statement of claim alleges that plaintiff was employed, in the early part of 1932, to work as a stenographer, at the agreed wage of \$17 per week, for the firm of Cleveland and Jackson; that defendants Cleveland and Jackson were copartners, practicing law under the firm name of Cleveland and Jackson; that plaintiff furnished stenographic work for said defendants from the time of her employment until September 30, 1934; that she was paid regularly until August 1, 1933; that after that date plaintiff earned for her services a total of \$1,035; "that each of said defendants paid her money from time to time and that the total of all payments made to her to apply on salary from August 1, 1933 on, was the sum of \$636.25, leaving \$398.75 due and owing to the plaintiff." The answer of defendant Cleveland (hereinafter called appellant) denies that plaintiff at any time fur-

40751

WILLIAM BOYD,  
(Plaintiff)

v.

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

CHAS. L. BOYD,  
DAVID L. BOYD,  
(Defendants)

nished any stenographic work for Chester E. Cleveland and David H. Jackson, copartners under the name of Cleveland and Jackson; denies that she was regularly or otherwise paid for any such work up to August 1, 1933, and denies that from August 1, 1933, on she earned a total of \$1,035 or any other sum <sup>by</sup> stenographic work for appellant and David H. Jackson, copartners as Cleveland and Jackson; alleges that during 1933 and for some time prior thereto appellant and David H. Jackson, and his brother, Andrew O. Jackson, occupied a suite of offices in the Otis Building under the name of Cleveland and Jackson; that the lease of the premises was to appellant and David H. Jackson, defendant, as individuals, and not to them as partners under the firm name of Cleveland and Jackson; that plaintiff knew that there was no partnership between appellant and defendant David H. Jackson, or between appellant and David H. Jackson and said Andrew O. Jackson; that appellant conducted and carried on his own business independently of David H. Jackson and Andrew O. Jackson; that appellant had no interest in or anything to do with the business carried on by David H. Jackson and Andrew O. Jackson, or either of them; that neither of said Jacksons had any interest in or anything to do with appellant's business, and that appellant had nothing to do with the alleged employment of plaintiff; that plaintiff was employed either by Andrew O. Jackson or David H. Jackson, or by both of them; that Andrew O. Jackson died July 6, 1934; that plaintiff at all times knew the relationship that existed between appellant and said Jacksons.

Plaintiff testified that she was married in the spring of 1935; that prior to that time her name was Ella Branigan; that in February, 1932, she went to an employment agency to seek a position as a stenographer and they gave her a card "bearing the firm name of Cleveland and Jackson, address First National Bank Building;" that she went to the address and found printed upon the door the name, "Cleveland & Jackson;" that she went into the office and had a talk with David H. Jackson; that she told him she understood they wanted a stenographer and "he asked what experience I had as a stenographer; I told him the number of years, and he asked me my references. I also gave him my references, where I had worked pre-



viously. Then he asked if I would be willing to work for \$17.00 a week, with the promise of a raise later, and he told me that I would take dictation, answer the 'phone, and work in the general reception office for Mr. A. O. Jackson, Mr. Chester E. Cleveland, and himself. I told him that would be agreeable to me, and he told me he would 'phone me at my home, which he did the following day. I came to work for them the following Monday. It was the latter part of the week I talked to him;" that she "took dictation from the three gentlemen, answered the 'phone calls, and ran errands around the Loop occasionally;" that she had no duties to perform in reference to any books of account; that the letterheads and stationery that they used in the office bore the name, "Cleveland & Jackson;" that during the period of her employment she took dictation work for Mr. Cleveland, David H. Jackson and A. O. Jackson; that the greater part of the dictation work that she did was for "Mr. Cleveland;" that her salary was paid her regularly until August, 1933; that at first David H. Jackson paid her and later A. O. Jackson paid her; that she was paid by the individual checks of A. O. Jackson and David H. Jackson; that Mr. Cleveland gave her "two cash payments in May, 1933, and three cash payments in August, 1933;" that in May, 1934, she gave a statement to Mr. Cleveland, showing what was due her; that at the time she gave Mr. Cleveland the statement she told him Mr. A. O. Jackson was behind in her salary and that the statement she was handing him showed the amount of "the salary that they are behind;" that Mr. Cleveland took the statement and went into David H. Jackson's office with it; that "he came out and stood at my desk, and said, 'Don't worry about your salary; it will be paid to you;'" that during the entire time that she worked there no one ever told her "that Mr. Cleveland and the others were not partners;" that "the name of Cleveland & Jackson continued to be on the door, and on the stationery up until September, 1934;" that when she answered the telephone during the period of her employment she always answered, "Cleveland & Jackson;" that after September 30, 1934, she wrote letters to David H. Jackson and Mr. Cleveland concerning the balance that was due her; that she wrote four



letters in relation to that matter to Mr. Cleveland. Upon cross-examination plaintiff testified that she did not talk to appellant about her employment; that Mr. Cleveland never paid her anything on account of her salary up to August, 1933; that the first time he ever paid her anything was in May, 1934; that he paid her \$15 in May and \$17.50 in August; that these payments were not for overtime work but were to be applied on account of her salary; that it is not true that she did most of her work for A. O. Jackson; that she did the least work for him; that she had nothing to do with any books. Upon redirect plaintiff testified that "the firm was listed in the telephone book as Cleveland & Jackson," and the same way in the legal directories; that "Mr. Jackson paid his share of the office rent; Mr. Cleveland paid his share;" that she had taken Mr. Cleveland's check up to the office of the building. On re-cross-examination plaintiff testified that she never saw any check signed, "Cleveland & Jackson."

Appellant was the only witness who testified for the defense. He testified that he was a lawyer and that he had offices in the place in question during the period in question; that during that period he had an arrangement with David H. Jackson and A. O. Jackson "that we had a lease for \$200 a month and I arranged with them that I would pay \$100 a month, and they would pay the other \$100 a month, and all the other expenses;" that plaintiff was employed in the offices during the period in question but that he never had any conversation with her concerning her employment; that David H. Jackson owned the law library in the suite; that appellant "had very little dictation with Mrs. Boyle - Miss Branigan, she was at that time;" that from February, 1932, when Mrs. Boyle first started working in the office, until May, 1934, he never had any conversation with her concerning the payment of her salary; that he "paid her - occasionally, I had her do some work for me. I paid her for those specific services;" that as to plaintiff's testimony that he had paid her on account of her salary, "she is mistaken about that;" that the sums she testified he had paid her "were paid her for doing some specific work;" that he was never a partner of David H.

letter to the effect that the examination of the body was completed.

The body was then placed in the vault and the vault was sealed.

The vault was then opened and the body was removed.

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Jackson or A. O. Jackson, or either of them; that they did not have a joint checking account. On cross-examination appellant testified that "we never had any books of account; that when plaintiff furnished him with a statement of her account he supposed that it was given him "as a matter of information - I don't know;" that he did not dictate briefs to her; that "it is very possible that I may have dictated [to her] general issues, or something like that;" that not to his recollection did he dictate bills and answers in chancery cases to her; that he and the Jacksons had no arrangement about dividing fees; that there were a few cases in which David Jackson and appellant took part, "but each one of us did our own work in that case. We had no joint accounts." The following then occurred: Q. "And you handled some lawsuits together? A. Yes, I had been associated with him, and other lawyers, too. Q. And that was true of many lawsuits during this period? A. No, not many. Q. Now, on those cases you divided the fee, did you not? A. No, each one got his own, if he got anything. Some of them didn't get anything." Appellant further testified that he did not tell plaintiff that she need not worry about her salary and that she would be paid in full.

Plaintiff's claim is predicated upon the theory of fact that appellant actively and in a public manner held himself out as a partner by allowing the use of his name in a firm name, and that he was liable to plaintiff, who had dealt with the firm on the faith of the ostensible partnership, regardless of any secret agreement that appellant and the Jacksons may have had between themselves. Appellant's position is, "There was no 'holding out as a partnership.' To the rule as to 'holding out' there is an exception as firmly established as the rule itself, viz: that it does not apply where, as here, the party relying on such holding out knew or had reasonable cause to believe that there was, in fact, no partnership." Appellant argues that plaintiff should have known from the things that came to her attention while she was working in the offices that there was no partnership.



Many years ago, in the case of Fisher v. Bowles, 20 Ill. 396, the court, speaking through Mr. Justice Breese, said:

"Partnership cannot always be proved by written articles. In fact, in very many cases, writings do not exist, and especially in a steamboat concern. In such cases, and in all cases, the rule is, if a person suffer his name to be used in a business, or otherwise hold himself out as a partner, he is to be so considered, whatever may be the agreement between him and the other partners. 3 Kent's Com., 52; Collyer on Part., 75, sec. 80; Stearns v. Haven, 14 Vt., 540.

"The court, in this case, say, whether persons are partners inter se may depend on their contract between themselves. Whether they are partners as to others depends on their conduct.

"A party permitting his name to be used, or holding himself out as a partner, will be equally responsible with other partners, although he may receive no profits, for the contract of one is the contract of all. Guidon v. Robson, 2 Camp., 802.

"This rule of law arises, not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which persons would be exposed, if they were to suppose they lent their money, performed the work, or furnished the materials, upon the apparent credit of three or four persons, when, in fact, they did all those to two only, to whom, without the others, they would have lent nothing, performed no work, or furnished materials. Waugh v. Conner, Carver & Giesler, 2 Henry Blackstone, 235, a leading case, with copious and instructive notes."

The decision in that case has been followed in many later cases decided by the Supreme court and the Appellate courts of this State, but it would unduly lengthen this opinion to cite them. Underlying them all is the rule announced by Mr. Justice Breese, that whether persons are partners as between themselves may depend upon their contract with each other, but whether they are partners as to others depends upon their conduct. Section 16, par. 16 (Partnership; chap. 106 1/2, Ill. Rev. Stat. 1939), reads as follows: "(1) When a person, by words



spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made. \* \* \*"

After a careful consideration of the evidence, viewed in the light of the law, we are satisfied that the trial court was justified in finding for plaintiff.

Appellant raises several technical points in support of his contention that the judgment should be reversed, but we find no substantial merit in them.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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40764

NELLIE MOLLOY,  
Appellee,

v.

CHICAGO CITY BANK & TRUST  
COMPANY, a corporation,  
Appellee.

LAURENCE M. FINE,  
Intervenor and Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

303 I.A. 74<sup>2</sup>

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Nellie Molloy, plaintiff, sued Chicago City Bank & Trust Company, a corporation, defendant, to recover certain funds on deposit in a joint account of her sister, Irene R. Molloy, and one Ellery G. Eddy. Upon a hearing by the court there was a finding for plaintiff for the full sum on deposit, \$140.04, and judgment was entered on the finding. Laurence M. Fine, intervenor, who filed a petition for an adjudication of his attorney's lien against said deposit, appeals from the judgment.

Plaintiff's verified statement of claim is as follows: "1. Plaintiff is the sister of Irene R. Molloy. 2. Under December 4, 1936, Irene R. Molloy opened a savings account with the defendant, Chicago City Bank & Trust Company, in the name of 'Irene R. Molloy or Ellery G. Eddy'. 3. On September 9, 1938, there was a balance in said account of \$140.04. 4. On said 9th day of September, 1938, Irene R. Molloy executed a receipt and withdrawal slip on the defendant bank for the sum of \$140.04, which she delivered to plaintiff as a gift. 5. Plaintiff took said withdrawal slip to the bank together with the pass book for said account, numbered 175739, and presented it to an officer of said bank and demanded payment of said sum, which payment was refused. 6. Defendant still refuses to pay over said

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JAN 11 1936

V.

CHICAGO CITY BANK  
120 N. WABASH ST.  
CHICAGO, ILL.

TO THE ORDER OF  
JAN 11 1936

THE CHICAGO CITY BANK  
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CHICAGO CITY BANK  
120 N. WABASH ST.  
CHICAGO, ILL.  
TO THE ORDER OF  
JAN 11 1936  
THE CHICAGO CITY BANK  
CHICAGO, ILL.



sum to plaintiff, although plaintiff is lawfully entitled thereto."

The Bank & Trust Company, defendant, filed the following defense: "Defendant acknowledges its liability to the person entitled to the balance in the account of Irene R. Molloy or Ellery G. Eddy. Suit has been instituted by Ellery G. Eddy to recover the same and the Bank has a notice of attorney's lien from Laurence M. Fine who says he is attorney for Ellery G. Eddy. This defendant prays that the Court will determine who is entitled to the balance of said account and offers to satisfy a judgment for the same without costs."

The verified petition of appellant, filed with the clerk of the court, apparently without leave of the court, states: "1. He admits there is on deposit in defendant bank the sum of \$140.04 as the joint account of Irene Molloy and Ellery G. Eddy; that they were tenants in common of said funds; that said Irene Molloy died on September 21st, 1938. 2. On September 6th, 1938, said Ellery G. Eddy made demand upon said defendant bank and presented a draft against said account for the full amount thereof, but the said defendant bank refused to honor said withdrawal slip and refused to pay to said Ellery G. Eddy the said amount on deposit. 3. Petitioner is an attorney at law and was prior to said date, September 6th, 1938, retained by Ellery G. Eddy for the enforcement of his right to the aforesaid funds and for other services, evidenced by a written contract between said Eddy and petitioner, providing for the payment for such services a minimum of \$200, which said Eddy therein undertakes and agrees to pay and further provides that petitioner shall have a lien therefor upon any moneys or property which may accrue and which he is entitled to. 4. That on said 6th day of September, 1938, petitioner personally served upon said defendant bank a Notice of Attorney's Lien for one-half of the sum of \$140.00. 5. That petitioner is entitled to a judgment against the defendant bank, upon his attorney's lien, in the sum of \$70.00; and for the further sum of \$170.00 as a minimum under his said lien, as by the Statutes of the State of Illinois in such cases made and provided.



Wherefore petitioner prays for judgment in the sum of \$70.00 against the defendant herein, and for the further sum of \$130.00 against any amount received or recovered in behalf of said Ellery G. Eddy." No finding or judgment was entered upon appellant's petition.

The "Statement of Facts and Finding of the Court" is as follows:

"1. That there was on deposit with the defendant bank, Chicago City Bank & Trust Company, the sum of \$140.04, in a joint account in the names of Irene Molloy and Ellery G. Eddy. On September 5th, 1938, Ellery G. Eddy served notice on the bank in words and figures as follows:

"Sept. 5, 1938

"TO CHICAGO CITY BANK & TRUST COMPANY:

"Notice is hereby given you that I have sole authority to sign withdrawals and to withdraw funds from my savings account at your bank, held jointly with Irene Molloy and I direct you to permit no withdrawals therefrom except upon my signature. The account is Number 175739.

"(signed) Ellery G. Eddy

"2. On September 6, 1938, Laurence M. Fine, intervenor herein, and Ellery G. Eddy, served notice of attorney's lien, under their signatures, upon defendant bank, in words and figures as follows:

"NOTICE OF ATTORNEY'S LIEN

"TO: CHICAGO CITY BANK & TRUST COMPANY, CHICAGO, ILLINOIS:

"You are hereby notified that I have been retained by Ellery G. Eddy, as his attorney, under a written contract by him duly signed, executed and delivered, to represent him and to render specified service, in connection with several proceedings, negotiations and adjustments, respecting his financial status, rights and obligations arising out of his relationship with Irene Molloy and involving mutual savings account, being Number 175739, with your bank; and that in connection with said proceedings, the said Ellery G. Eddy has agreed to pay for such services, inter alia, a sum equal to one-half of the sum of \$140.00 (One Hundred forty Dollars) on deposit in said mutual account, and I now claim said lien for said one-half of said amount, as my attorney's lien.

"(signed) Laurence M. Fine  
139 N. Clark St.  
Central 5220

"I, the undersigned, agree to said lien as hereinabove set forth.



"(signed) Ellery G. Eddy

"Sept. 6, 1938."

"3. Thereafter on the 9th day of September, 1938, Irene R. Molloy, being seriously ill, gave to Nellie R. Molloy, her sister, the total amount on deposit in said bank account. Irene Molloy thereupon executed a withdrawal slip for the balance then in the bank account, namely, \$140.04, and gave the withdrawal slip, along with the bank deposit book to the plaintiff, Nellie Molloy, who on said date, September 9, 1938, presented the withdrawal slip and the bank book to the bank and made demand for said sum. Irene Molloy died on September 21, 1938. Irene Molloy had possession of the bank book at all times up to September 9, 1938, when she gave and delivered the bank book to the plaintiff, her sister Irene R. Molloy. Ellery G. Eddy does not appear in this suit.

"4. The bank refused to honor the notices and withdrawal slip but retained the funds pending an adjudication of the party entitled thereto. The bank book involved herein contains Paragraph 3 of the by-laws as follows:

"Money deposited for savings and the interest thereon may be withdrawn by the depositor personally or by written order if the bank has the signature of the depositor on record, or by authority of a power of attorney duly authenticated; but no orders for money shall be payable on account of such deposits unless the depositor's pass book be produced in order that such payments may be entered therein unless the depositor shall prove to the satisfaction of the officers of the bank that such book has been lost, stolen or destroyed, and in such case a written discharge with indemnity to the bank against all loss or damage for the payment made without the production of such pass book shall be given by the depositor to the bank."

"5. At the opening of the joint account Irene Molloy and Ellery G. Eddy signed a card containing printing on both sides, as shown on the copy hereto attached.

"6. Laurence M. Fine, attorney at law filed his petition to intervene and for an adjudication of his attorney's lien against the funds in the joint account, based upon a contract with Ellery G. Eddy, co-depositor, filed by him herein.

"7. The court finds that the ownership of the funds is

"7. The court finds that the ownership of the funds is co-depositor, filed by him herein.

funds in the joint account, which were deposited in Henry C. Lady, intervene and for an affidavit filed in support of the same.

"8. Lawrence E. Lady, Jr., is a partner in the firm of Henry C. Lady, Jr. and is shown on the copy of the same.

Henry C. Lady, Jr. is a partner in the firm of Henry C. Lady, Jr. and is shown on the copy of the same.

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governed by the by-laws appearing in the bank pass book and that therefore the entire fund on deposit belonged to Irene Molloy on the date of her delivery of bank book and withdrawal slip to plaintiff, Nellie Molloy, and that Nellie Molloy acquired the sole rights to the funds upon such assignment. Judgment for the sum of \$140.00 is therefore entered in favor of the plaintiff.

"I, William V. Daly, Judge of the Municipal Court of Chicago, hereby certify that the above facts, proceedings and rulings of the court are correct.

"[Signed] William V. Daly  
"Judge of the Municipal  
Court of Chicago

"Dated at Chicago, Illinois  
this 1st day of February 1939."

Attached to the statement of facts is the following:

"175739

"The undersigned agree to all the by-laws and regulations governing savings accounts of the Chicago City Bank & Trust Co., Chicago, together with any changes therein which may from time to time be adopted by said bank. The bank is authorized to forward items for collection or payment direct to the drawee or payor bank or through any other bank at its direction and to receive payment in checks or drafts drawn by the drawee or other banks, and except for negligence, the bank shall not be liable for dishonor of the checks or drafts so received in payment, nor for losses thereon.

"Sign	( 1	)	Jointly
Here	( 2	)	or
	(	)	Severally

"Address 6336 Ingleside Ave

"Birth	(		Birth-	)	
Place	( 1	Chicago, Ill.	day	)	1 Sept. 28
"	( 2	Albion, Penna.	"	)	2 Sept. 20
"	(		Mother's	)	1 Matilda
Occupation	(1	Housekeeper	Maiden	)	Hendrickson
"	(2	Mechanic	Name	)	2 Mary Jane

"Phone	Dorchester 7791	Date	Dec. 4, 1936
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"Authorized  
Signature

"I hereby authorize above party to sign savings withdrawal orders in my name against my account Date

"On the reverse side

"JOINT ACCOUNT AGREEMENT  
"(Pay to Either or Survivor)

"CHICAGO CITY BANK & TRUST CO.





"The undersigned hereby agree that all funds now or hereafter deposited to the credit of their joint account with the Chicago City Bank and Trust Co., or any part thereof, and any interest thereon, may be paid to any one of the undersigned, whether the others be living or not. It is further agreed that the bank may charge to this account any check, draft, or other order signed by any of us, or dishonored paper endorsed by any of us. Any of us may endorse and deposit in this account any instrument payable to any of the others of us, and transact any other business on this account.

"1 IRENE R. MOLLOY (signed) \_\_\_\_\_

"2 ELLERY G. EDDY (signed) \_\_\_\_\_

"Chicago \_\_\_\_\_ 19\_\_\_\_

"Witness \_\_\_\_\_"

Appellant states his position as follows: "Intervenor's theory of the case is that the possession of the bank passbook is immaterial as determining the ownership of joint funds, as between co-depositors; that the court was without jurisdiction to adjudicate the rights of joint depositor, Ellery G. Eddy, without notice nor process against him; that the court failed to follow the statute respecting adverse claimant as disclosed by the answer of defendant bank as well as plaintiff's statement of claim wherein the interest of Ellery G. Eddy as joint tenant is admitted; that intervenor's rights under his Notice of Attorney's lien and under his written contract are absolute, under the statute, and ought to have been adjudicated by the court as prayed in intervenor's petition, and judgment entered thereon." Plaintiff contends that under the record in this case the intervenor had no interest in the proceeding before the trial court and has no right to complain of the judgment entered by the trial court. This contention of plaintiff seems to be a meritorious one. While appellant filed, with the clerk of the court, apparently without leave of court, a petition for an adjudication of an alleged attorney's lien, it appears from the record that he took no steps to have plaintiff or the Bank answer the same. From the "Statement of Facts and finding of the Court" we must assume that appellant offered no evidence in support of his petition. Indeed, there is nothing to show that appellant asked the court to pass upon the petition. There is nothing in the trial court's statement to show that appellant made any objection

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to the court's finding and judgment. The statement does not even show that appellant appeared at the hearing before the court in person or by counsel. From the state of the record, including the judgment - that makes no reference to appellant's petition - we might reasonably conclude that the trial court considered appellant's petition, if it were called to his attention, as abandoned.

Appellant, in this court, contends that Ellery G. Eddy was a necessary party to the proceeding, "yet the court neglected to obtain jurisdiction of him under the statute, but proceeded to adjudicate his rights and entered judgment divesting him of his rights to his funds." Our conclusion that appellant, under the record, had no interest in the proceeding before the trial court, makes it unnecessary for us to pass upon the instant argument, but we may say that there is nothing in the trial court's statement of facts to show that any such question was raised or suggested in the trial court, and appellant did not move to bring Eddy into the proceeding, by his petition or otherwise. The trial court could not, in the condition of the record, have entered a judgment for Eddy, even if he had believed from the testimony that Eddy was entitled to the fund or some part of it. How then could appellant have expected to enforce the alleged lien in this proceeding? We note that the answer of the Bank & Trust Company, defendant, states that Eddy has sued it to recover the amount of the deposit, and that appellant says he is the attorney for Eddy. It would seem as though the suit of Eddy against the Bank would be the proper place for appellant to file a petition to enforce his lien. From anything that we have said we must not be understood as intimating that the finding and judgment of the trial court were not justified under the facts.

The appeal of Laurence M. Fine, intervenor, is dismissed.

APPEAL DISMISSED.

Sullivan, P. J., and Friend, J., concur.

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Sullivan, P. J., and Friend, J., concur.

40781

DAVID BARRY and MARY BARRY,  
Appellees,

v.

ALFRED H. MAACK,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

303 I.A. 75

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal from an order denying defendant's motion to quash a capias ad satisfaciendum issued pursuant to the judgment entered in the aforesaid suit wherein appellant was the defendant. He will be hereinafter called the appellant.

An incomplete record is presented upon this appeal. Even the judgment in the original cause is not included in the record, and it appears from the praecipe for record filed by appellant that he did not desire the judgment order to be included in the transcript of the record. From the incomplete common law record before us we find that a jury returned a general verdict of guilty against appellant, and that there was submitted to the jury "a certain special interrogatory, \* \* \* in words and figures following, to-wit: The court instructs you that there is submitted to you a special interrogatory for you to answer 'Yes' or 'No' and you will return your answer to said interrogatory with your verdict. Question: Did the defendant at the time and place in question fraudulently, maliciously and deceitfully obtain the property of the plaintiffs: Answer: Yes." (Here appear the signatures of the jury.) Appellant did not appeal from the judgment entered against him in the original cause.

Appellant's position, upon this appeal, is as follows: He concedes "that if the defendant were seeking to question the rightfulness of the finding that malice was the gist of the action, his only avenue would be by way of direct appeal. \* \* \* That he

DAVID M. BELL

APPELLANT'S EXHIBIT

cause.

Appellant's position, upon this appeal, is as follows:

He concedes "that if the defendant were seeking to question the rightfulness of the finding that malice was the gist of the action, his only avenue would be by way of direct appeal. \* \* \* That he

does not in this proceeding question the correctness of that finding on the part of the jury in the trial of this case in the Circuit Court. He could not be heard to do so in this proceeding. He does question, and he has a right to question, the nature of the judgment, the nature of the case. He raises, as he has a right to raise, the question whether this is in fact a tort action, or whether it is not, in fact, an action in contract. \* \* \* That the complaint in the instant case does not state any cause of action in tort. \* \* \* That for the reason that it is apparent from the pleadings in this case that it was not an action in tort, the judgment upon which the writ issued was not for a tort committed by the defendant, wherefore, regardless of the finding of the jury that malice was the gist of the action, the body execution ought not to have issued," and that appellant's motion to quash the capias ad satisfaciendum should have been granted. Appellant concludes his argument as follows: "The complaint in the instant case is insufficient to give to the Court jurisdiction to enter a judgment as for a tort, committed by the defendant. It follows, in consequence that the Court was without jurisdiction to issue the body execution complained of herein by defendant."

In support of his position appellant cites sec. 5, par. 5, chap. 77, Ill. Rev. Stat. 1939, which is as follows: "No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear from a special finding of the jury, or from a special finding by the court, if the case is tried by the court without a jury, that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors." As appellant did not see fit to incorporate the judgment in the record we must assume that it was a proper judgment in tort. From the record before us we must conclude that both parties treated it as an action in tort. There is nothing in the record to indicate that appellant, during the trial of the original cause, raised, in any way, the contention now advanced. Indeed, appellant

[illegible]



concedes that in the trial of the original cause it was assumed that the action was in tort and that the contention that it was not such an action was first raised upon the motion to quash the writ.

The following is the complaint in the cause:

"Plaintiffs, David Barry and Mary Barry, by Norman Peters and Leo G. Hanna, their attorneys, complaining of Alfred H. Maack, defendant, allege:

"1. That the defendant on or about January 31st, 1933, in the City of Chicago, County of Cook and State of Illinois, falsely and fraudulently represented to the plaintiffs and each of them, well knowing such representations to be false, that he then and there was the owner in fee simple, unencumbered by any mortgage or other lien, of the lot or parcel of real estate and the improvements thereon generally known as 6841 Calumet Avenue, upon which there was a two flat building and also a lot or parcel of real estate at the corner of 57th Street and Turner Avenue, upon which there was a five room bungalow, both of said properties being situated in the said City of Chicago.

"2: That the defendant then and there was not the owner in fee simple, free and clear of any mortgage encumbrances or other liens of said lots or parcels of real estate or either of them, and that the same and each of them then and there and from thence hitherto were and are encumbered by mortgages.

"3: That the defendant at said time and place in consideration of the sale and delivery to him by the plaintiffs of certain Home Owners Loan Corporation Bonds of the agreed value of \$2000.00 for which defendant executed and delivered to plaintiffs a receipt for the sum of \$2000.00 and promised that within six weeks thereof he would deliver to plaintiffs a mortgage note evidencing the obligation of the defendant and his wife to pay to the plaintiffs the principal sum of \$2000.00, said note to be dated at Chicago, Illinois on said January 31st, 1935 payable to the order of the plaintiffs two years after date and bearing interest on said principal sum at the rate of 6% per annum after date,



interest payable semi-annually, said note to be secured by a good and sufficient first mortgage, deed or first mortgage trust deed, on one or the other of said lots or parcels of real estate; that at the expiration of said six weeks the plaintiffs demanded said mortgage note to be secured as aforesaid whereupon the defendant delivered to plaintiffs a promissory judgment note in the principal sum of \$2000.00 dated at Chicago, Illinois, January 31st, 1935 payable two years after date to the order of the plaintiffs and each of them to accept on his representation and promise that the giving of such note merely was a temporary measure due to the delay he had suffered in obtaining a merchantable abstract of title to either of the premises aforesaid showing fee simple title in the defendant unencumbered by mortgage or other liens, which defendant would obtain within a reasonable time, whereupon the said promised first mortgage note and mortgage deed or trust deed securing payment of same as aforesaid would be substituted for said judgment not. [note]

"4: That on or about January 31st, 1937, the defendant informed the plaintiffs, after many repeated demands upon him for the substitution aforesaid, that he could not make such substitution because of mortgage liens upon both of said lots or parcels of real estate which was the first knowledge plaintiffs or either of them had obtained thereof.

"5: That the plaintiffs and each of them relying implicitly upon said false and fraudulent representations of the defendant, sold, conveyed and delivered to him said Home Owners Loan Corporation bonds.

"6: That the above representation by defendant as to his then ownership of said lots or parcels of real estate clear and free of any mortgage liens or encumbrances were made by the defendant to the plaintiffs, and each of them with the intent that they and each of them should rely thereon; that the said representations were false and were known by the defendant to be false and that the plaintiffs and each of them did rely thereon and thereby the defendants falsely deceived and defrauded the plaintiffs and each of them.

"7: That the plaintiffs claim damages in the sum of \$2000.00,



the value of the said Home Owners Loan Corporation Bonds together with the additional sum of \$1000.00 as punitive damages.

"8. To the damage of the plaintiffs in the sum of \$3000.00.

"Wherefore, plaintiffs pray judgment against the defendant for said sum of \$3000.00."

Appellant's answer denies that he made the false and fraudulent representations alleged in the complaint; alleges that he purchased from plaintiffs the Home Owners' Loan Corporation bonds and paid for them by giving plaintiffs his promissory note in the sum of \$2,000; that at "the time of said purchase of the Home Owner's Loan Corporation bonds, he was the owner of considerable property but that the encumbrances on same were of record and that he at no time concealed his financial condition, but in fact made it clear to the plaintiffs by telling them that he could not pay for said bonds for a period of two years and that the plaintiffs knowing this turned over said bonds to the defendant and accepted in exchange his promissory judgment note due two years thereafter. Defendant therefore alleges that plaintiffs are entitled to the sum of \$1975.00 which he freely admits is due them and which he fully intends to pay but states the fact to be that there at no time was any fraud, compulsion or deceit practiced against said plaintiffs."

Appellant concedes that the complaint "contains many allegations which apparently charge the defendant with the commission of some tortious action or actions," but that in view of other allegations in the complaint there arises some doubt as to what was the basis of the action. Even if the instant question were presented to us upon an appeal from the judgment entered in the original case, we would not hold that the complaint was fatally defective in stating an action in tort, especially in view of the fact that counsel for both parties and the trial court treated the complaint as setting up an action in tort.

"Section 42 of the Civil Practice Act, ch. 110, par. 166, Ill. Rev. Stat. 1937, provides: '(3) All defects in pleadings, either



in form or substance, not objected to in the trial court, shall be deemed to be waived.' Vlahos v. Andrews, 362 Ill. 593; Carson-Payson Co. v. Peoria Terrazzo Co., 288 Ill. App. 583." (Brandtjen & Kluge, Inc. v. Forgue, 299 Ill. App. 585, 590.) "Under the Civil Practice Act (Ill. State Bar Stats., 1935, chap. 110, pars. 161 and 170) pleadings are to be liberally construed with a view to doing substantial justice between the parties, and no pleading is to be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet, and all defects in the pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived. In Carson-Payson Co. v. Peoria Terrazzo Company, 288 Ill. App. 586, this court held that even the failure to allege in a complaint in tort that the plaintiff was free from contributory negligence was not such a defect as could be taken advantage of upon appeal where the sufficiency of the pleading had not been challenged in the trial court. If the complaint here was defective, we hold the defect has been waived by the defendant." (Engel v. City of Chicago, 290 Ill. App. 604, Abstract opinion.)

Here we have a case where both parties, in the trial court, treated the action as one in tort, and under the record in this case we would not be warranted in holding that the complaint was so fatally defective that it would not support a verdict and judgment in tort.

The order of the Circuit court of Cook county denying appellant's motion to quash the capias ad satisfaciendum is affirmed.

ORDER DENYING MOTION TO QUASH  
CAPIAS AD SATISFACIENDUM AFFIRMED.

Sullivan, P.J., and Friend, J., concur.





40975

FERRIS SMITH,  
Appellee,

v.

GERALDINE S. ROBERTS,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

303 I.A. 89

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On April 7, 1937, Ferris Smith, plaintiff herein, secured a judgment by confession against the defendant, Geraldine S. Roberts, predicated on a note executed June 23, 1926, by Thomas T. Roberts and Geraldine S. Roberts, husband and wife. Execution issued on the judgment and was returned "No service and no property found."

On January 16, 1939, Geraldine S. Roberts, defendant herein, appeared specially and moved the court to vacate the judgment by confession of April 7, 1937, and advised the court of the death of Thomas T. Roberts prior to the entry of the judgment.

Thereafter, March 16, 1939, Harry J. Myerson, attorney for the plaintiff, filed of record in the Municipal court, where the judgment by confession had been entered, an affidavit which set forth in substance (1) that since the entry of the judgment by confession on April 7, 1937, the Circuit court of Appeals for the seventh district, in a cause entitled Roberts v. Metropolitan Life Insurance Co. (94 Fed. (2nd) 277), adjudicated the validity of the several confession upon certain of the notes executed by Geraldine S. Roberts and Thomas T. Roberts constituting one of the series of notes of which the note in this case is a part, which were identical with the note herein except as to the amounts thereof; that thereafter defendant made application in that cause to the Supreme court of the United States for the issuance of a writ of certiorari to review the judgment of the Circuit court of Appeals in said cause, which was in due course denied (303 U. S. 660) thereby establishing judicially the validity of the confession upon the

[illegible]

note which is here under consideration; (2) that subsequent to the denial of the petition for writ of certiorari in the Supreme court of the United States, Geraldine S. Roberts filed a certain bill of review in the United States District Court for the Northern District of Illinois, Eastern Division, in a cause entitled Roberts et al. v. Charles H. Albers, as receiver of Cody Trust Co., in cause No. 16057, wherein she sought to review and set aside the judgment entered in the cause of Roberts v. Metropolitan Life Insurance Co. on the ground that the judgment was null and void, because the warrant of attorney required a joint confession and not a several confession, and thereby the District Court of the United States, the Circuit Court of Appeals and the Supreme Court of the United States, in the several causes were without jurisdiction over the subject matter; (3) that on June 7, 1938, the court dismissed without prejudice the bill of review on motion of Charles H. Albers as receiver, leaving the judgment remaining in full force and effect; (4) that Geraldine S. Roberts thereafter filed a petition in the Circuit court of Cook county in a cause entitled People of the State of Illinois v. Cody Trust Company, No. B-282921, wherein she sought to vacate and set aside the judgment by confession entered by the Honorable William V. Brothers on December 16, 1935, and that subsequently Judge Brothers, upon full hearing, denied the motion to vacate the judgment, leaving the same in full force and effect; (5) that thereafter Geraldine S. Roberts filed a petition in the cause B-282921 in the Circuit court of Cook County, seeking to recover from Albers as receiver the proceeds of the judgment paid to him by her under the decree entered in the Federal court on the ground that said payment was made by mistake of law or fact, in that the Federal court was without jurisdiction to enter the aforesaid decree, since the original judgment by confession was void, and in violation of the warrant of attorney, not having been confessed jointly instead of severally against the makers of the note; and upon hearing by the court, the motion made to strike said petition was sustained, and the petition was dismissed by the Circuit court; (6) that since the entry of judg-



ment by confession by plaintiff against defendant on April 7, 1937, a suit was brought on the judgment in the Municipal court of the City of Los Angeles, California, in a cause entitled Keilsohn v. Geraldine S. Roberts, No. 487781; that Geraldine S. Roberts filed an answer and defense in that case denying the validity of the judgment because the confession was made severally and not jointly, and in violation of the warrant of attorney; that the issues thus raised were heard by the court, and on December 27, 1938, the court rendered judgment for plaintiff and against defendant, sustaining the validity of the judgment and of the confession entered in Cook county upon the promissory note; and that the judgment so rendered in California in favor of plaintiff remains in full force and effect, not having been set aside, vacated or reversed, and is res adjudicata against the defendant upon the same issues raised in this proceeding; (7) that on January 20, 1939, after the order was entered in the case at bar, vacating the judgment by confession, a motion was made in the California case by Geraldine S. Roberts, within term time, seeking to vacate and set aside the judgment there entered, because of the entry of the order herein vacating the judgment in this cause; that the California court denied said motion, and thereby adjudicated that the judgment herein by confession was valid and binding upon Geraldine S. Roberts; (8) that subsequently, February 11, 1939, Geraldine S. Roberts in the California cause filed a writ of prohibition in the Court of Appeals in California, praying that the lower court in the California cause be enjoined and restrained from enforcing execution of the judgment therein entered, and from conducting further proceedings in said cause on the ground that the judgment herein confessed was void and did not authorize the several confession; but that the court of appeals upon the hearing of said writ and demurrer thereto filed, sustained the demurrer without leave to amend, and dismissed the writ, and thereby determined that the judgment here confessed is valid and binding upon defendant; (9) that Geraldine S. Roberts, since the entry of the judgment in the cause at bar, on April 7, 1937, has at all times had full knowledge and notice of



the judgment, as will appear from the cause of Roberts v. Metropolitan Life Ins. Co., 94 Fed. (2nd) 277, wherein plaintiff sought to intervene in the interpleader proceedings and recover a distribution from funds of said Geraldine S. Roberts in the custody of the court in that cause; (10) and it is alleged by said Harry J. Myerson that his affidavit is made for the purpose of informing the Municipal court of Chicago of the foregoing proceedings and to show the court that it was grossly imposed upon in vacating the judgment, without having been previously informed of the many proceedings in which adjudications had been made adversely to Geraldine S. Roberts, and to induce the Municipal court to vacate and set aside the order of January 16, 1939, vacating the judgment by confession without taking into consideration the facts and circumstances set forth in the affidavit thus presented to the court and the history of the proceedings that are detailed in the affidavit.

On May 29, 1939, the Municipal court granted leave to file Myerson's affidavit which made the following allegations: (1) that some time subsequent to the rendition of judgment herein he prepared an assignment of all his right, title and interest in the judgment from Ferris Smith, plaintiff, to one L. Keilsohn of the City of Los Angeles, California; that Keilsohn as assignee filed suit upon the judgment entered in this cause by confession, and prosecuted same to judgment in the Municipal court of Los Angeles, California; that thereafter process issued, was served upon Geraldine S. Roberts, and after due proceedings, judgment was there rendered in favor of Keilsohn, which is now in full force and effect and remains unvacated, not satisfied and not reversed; that thereafter in the California cause Geraldine S. Roberts filed certain proceedings in the Appellate court of Los Angeles, California, seeking to vacate and nullify the judgment entered by the Municipal court of that city, on the ground that the judgment was null and void, in that the warrant therein contained authorized only a joint confession, and not the rendition of a several confession; and that on April 15, 1939, after hearing, the Appellate court of California again affirmed the Municipal court of Los Angeles, and denied the prayer of Geraldine S.

the judgment, as will appear from the opinion of the court in the  
Life Ins. Co., 24 Cal. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000



Roberts, leaving the California judgment in full force and effect, and constituting res adjudicata of the validity of the judgment recovered in this cause.

The sole question presented on this appeal, as well as in all the proceedings hereinbefore set forth in the affidavit of Harry J. Myerson, was whether the warrant of attorney under which judgment was confessed is joint and several, so as to authorize the confession of judgment against defendant alone, or whether it is a joint note so that under the warrant of attorney a judgment by confession against one of the makers is void ab initio and subject to collateral attack, as defendant contends and has contended throughout these several proceedings.

Since the filing of the briefs on this appeal the third division of this court in an opinion prepared by Mr. Justice Hebel, and filed October 25, 1939, in the case of People v. Cody Trust Co., 301 Ill. App. 530, has exhaustively discussed the precise question here raised and has directly adjudicated the validity of a several confession entered by the Circuit court of Cook county against defendant in favor of Charles H. Albers, as receiver, on certain seven like notes held by him, all identical in terms and secured by the same mortgage issue as the present note. That opinion discusses some of the proceedings instituted by Geraldine S. Roberts, as well as the judgment there under consideration, and cites ample authority to sustain the conclusions reached. Inasmuch as we concur in the conclusions reached in that case, and the reasons in support thereof, it would be useless to restate the reasons and authorities which prompted the third division to hold that the warrant of authority in question is joint and several and therefore authorized the confession against defendant alone.

Therefore, the judgment entered by the Municipal court May 29, 1939, vacating the order of January 16, 1939, which set aside the judgment by confession, and confirming the judgment by confession on the note in question should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I A 224'

Present -- The Hon. FRED C. WOLFE, Presiding Justice  
Hon. BLAINE HUFFMAN, Justice  
Hon. FRANKLIN R. DOVE, Justice  
JUSTUS L. JOHNSON, Clerk  
E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



In the Appellate Court of Illinois

Second District

May Term, A.D. 1939

Alice Fleming,

Appellee,

vs.

City of Rockford, a  
Municipal Corporation,

Appellant.

Appeal from the Circuit Court  
of Winnebago County

DOVE, P. J.

This is an action brought by Alice Fleming to recover damages for personal injuries which she sustained while walking on a sidewalk near the business section of the City of Rockford. The trial was had before a court and jury, resulting in a verdict in favor of the plaintiff for \$400.00, upon which judgment was rendered and the defendant, City of Rockford, appeals.

The evidence is that about 4:30 o'clock on the afternoon of March 17, 1938 appellee was walking in a southerly direction on a concrete sidewalk on the east side of South Rockton Avenue near the Elm Street intersection in the City of Rockford. A filling station occupies the northeast corner of this intersection and a driveway from this filling station crosses South Rockton Avenue sidewalk on the east side of the street. This sidewalk, just north of this driveway was defective, the concrete having broken in an irregular shape along the outer edge or street side for a distance of seven feet and seven inches, the break diminishing toward the center of the walk. The walk was four and one-half feet in width and the break at its widest point, that is from the outer edge toward the center of the walk, was thirteen inches. Its maximum depth was two inches and its minimum depth was three-quarters of an inch below the surface of the sidewalk. Appellee

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he lived in Rockford thirty-six years and had walked up and down this walk on South Rockton Avenue many times. Upon this particular occasion the walk was dry and the sun was shining and appellee, accompanied by her married daughter, was returning home from marketing and was carrying a bundle of groceries and was walking south on the outside or street side of the walk and her daughter was walking beside her pushing a baby buggy. As they approached the gasoline station a car was being pushed along the driveway out into Rockton Avenue. Appellee testified that she was looking straight ahead and was thinking of the baby cab and cautioned her daughter, saying "There is a car being pushed out there and if you don't be careful it might start up and hit the baby cab"; that just as she spoke to her daughter she stepped in the hole in the walk and fell. She further testified that she did not see the defect in the sidewalk at all, did not know it was there and the first she knew about it was when she fell. Marie Lepart, the daughter of appellee, corroborated her testimony to the effect that her mother was looking straight ahead when she fell and further testified that she had lived in this neighborhood almost all her life and had observed the defect in the walk many times and recalled seeing it more than a year before. From her testimony and that of other witnesses, it is apparent that this crumbling in the walk had existed for at least a year and a half prior to March, 1938. Two photographs and a blue print of the sidewalk, showing the defect therein and the measurements thereof, were offered and admitted in evidence and we have examined them in the record.

The evidence in this record is not conflicting and appellant does not contend that the verdict is excessive or that there is any error in instructions or in the admission or rejection of evidence but does insist that the evidence discloses that appellee was not in the exercise of due care for her own

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safety and that therefore there can be no recovery. It is true, as counsel argue, that a City is not responsible for injuries occasioned by every defect allowed to remain in its sidewalks and that the only duty the City has under the law is to use reasonable care to keep its sidewalks in a reasonably safe condition for the use of the travelling public. City of Mattoon v. Faller, 217 Ill. 273; White v. City of Belleville, 284 Ill. App.322; Sherwin v. City of Aurora, 257 Ill. 458. Counsel for appellant concedes that the question of the exercise of ordinary care on the part of the plaintiff is ordinarily a question of fact for the jury but this case, argue counsel, from the testimony of appellee it affirmatively appears that she was not in the exercise of ordinary care for her own safety as she approached the scene of the accident. Appellant calls our attention to Devine v. Pfaelzer, 277 Ill. 255, which was an action to recover from the owner of a horse for the alleged wrongful death of Philip Fitzpatrick, who was killed in an attempt to stop the horse which was running away. The Supreme Court held that it was error for the trial court not to direct a verdict for the defendant and stated that an attempt by one to save the life of another, although at the risk of his own life or personal injury, is sufficient to exempt such person from a charge of negligence unless the act was rash or reckless, entailing almost certain injury to the one attempting the rescue, but that there was no evidence in the record tending to prove that anyone was in danger and that under the law the burden was on the plaintiff to prove that Fitzpatrick exposed himself to danger for the purpose of saving the life of some person then exposed to danger by the horse running away. That he had not done so and therefore was not relieved from proving that he was in the exercise of due care just before and at the time he received the injuries from which he subsequently died. Wilson v. Illinois Central Railroad Company,

subsequently died. Wilson v. Illinois Central Railroad Company, 101 Ill. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 91

210 Ill. 603 is also cited and it was there held that under the facts the trial court properly directed a verdict for the defendant. What these cases hold is that the question whether the plaintiff is in the exercise of ordinary care for his or her own safety is ordinarily a question of fact for a jury but if there is no evidence tending to show such care or of any fact or circumstance from which a reasonable inference of such care may be drawn, it is then the duty of the trial court to direct a verdict for the defendant.

In the instant case appellee was walking along the sidewalk on the east side of South Rockton Avenue, accompanied by her daughter, who was pushing a baby buggy, and they were approaching a gasoline station on the corner of Elm and South Rockton Avenue, the exit of which crosses the sidewalk upon which they were walking; that as they approached this driveway to the filling station, appellee saw in front of her an automobile being pushed across the sidewalk a few feet ahead of her and her daughter; that she became apprehensive and cautioned the daughter to be careful to avoid pushing the baby carriage into the path of the moving automobile. Before she said this to her daughter, she had not looked and had therefore not observed that the concrete had crumbled and that there was a defect in the walk. Just as she spoke, she stepped upon the broken portion of the sidewalk and fell. Her testimony is that although she had traveled this sidewalk frequently at other times for many years, she had never observed this defect in the walk. Had she looked at the walk she would have seen this defect and avoided falling and the law is as this court held in *Wilks v. City of Aurora*, 290 Ill. App. 615, that the reasonable care which the law exacts of all persons under such circumstances is to look where they are going ~~where they are going~~ and to use their eyes to direct their footsteps. Her thought, of course, was for the safety

direct their footsteps. Her thought, of course, was for the safety where they are going ~~where they are going~~ and to use their eyes to the law exacts of all persons that their eyes is to look

of the baby and her eyes were directed to the car and baby cab rather than the sidewalk where she was travelling. Had she used her eyes to direct her footsteps just prior to stepping upon the defective place in the sidewalk, she would have observed this defect in the sidewalk and she could easily have avoided it or passed safely over it. Counsel for appellee insist that it was not necessary for her to continually keep her eyes on the sidewalk, but that she had a right to assume ~~that~~ the sidewalk was in a reasonably safe condition for travel and cite the case of Graham v. City of Chicago, 260 Ill. App. 590, where it appeared that the City of Chicago caused a skating pond to overflow across a sidewalk and the water had frozen and a light snow concealed the slippery condition of the walk at the place where the plaintiff fell. In holding that the jury could properly find that the plaintiff was not guilty of contributory negligence, the court said: "She had no difficulty in walking on the sidewalk before she stepped on this icy strip, and the light snow which covered it and the rest of the sidewalk concealed it from her sight. She had no reason to suspect its presence before she stepped on it. A pedestrian is not obliged to keep his eyes glued to a sidewalk, but may assume it is in a reasonably safe condition." In that case, the sidewalk was covered with ice and the snow concealed the ice and the plaintiff had she looked, could not have discovered the slippery condition of the walk. The facts in that case are clearly distinguishable from the facts in the instant case. Here appellee could have seen the defect and avoided it if she had looked as she approached the place where she subsequently fell. Appellee heedlessly proceeded along this walk without looking. She could have looked at a time when her looking would have been effective and in failing so to do we think, as a matter of law, she proximately contributed to her own injury.

Under all the evidence the majority of this court is of the opinion that appellee was not in the exercise of due care for her



own safety just before and at the time she fell and received the injuries complained of and the judgment appealed from will therefore be reversed and the cause remanded.

Judgment Reversed and Cause Remanded.





STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



*abst.*

**FILED**

JAN 22 1940

*Clyde D. Mitchell*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A.D. 1939

Term No. 3

Agenda No. 3

ED RIDGWAY, Administrator of  
The Estate of WILLIAM RIDGWAY,  
Deceased,

Plaintiff-Appellee  
vs.

ILLINOIS CENTRAL RAILROAD  
COMPANY,

Defendant-Appellant.)

303 I.A. 224<sup>2</sup>

Appeal from the  
City Court of the  
City of East St.  
Louis, Illinois.

Dady, J.

The appellee, as administrator of the estate of William Ridgway, deceased, (who will hereafter be called the plaintiff), brought this suit in the City Court of East St. Louis against the appellant (hereafter called the defendant) to recover damages for the alleged wrongful death of William Ridgway, the plaintiff's intestate. The deceased was killed on December 12, 1936, when a truck which he was driving over a public highway crossing was struck by a passenger train of the defendant. A jury returned a verdict of \$3500 in favor of the plaintiff. Defendant made a motion for a judgment notwithstanding the verdict, which motion was denied. Defendant then made a motion for a new trial, which motion was also denied. Thereupon judgment was entered in favor of plaintiff, on the verdict, and defendant brings this appeal.



The defendant urges that the trial court erred in the denial of its motions for judgment notwithstanding the verdict and for a new trial and also erred in the giving of certain instructions on behalf of the plaintiff.

The accident which gave rise to this litigation occurred at a point about two miles east and south of the city limits of the City of Belleville at the crossing intersection of a country road known as the "Old Freeburg Road" and the main line of the defendant's railroad between Belleville and Carbondale, which main line consisted of the usual right of way with two parallel tracks referred to in the record as the north bound and south bound tracks. The highway runs in a general northerly and southerly direction and is intersected at this crossing by the defendant's tracks which run in a northwesterly and southeasterly direction. The railroad and the highway at this point come together at an angle of approximately forty-five degrees. 68

On the day in question the decedent, who was sixty-six years of age and in good health, had driven his Dodge truck, which was a new model of three or four tons capacity and apparently in good mechanical condition, to a coal mine located about two miles south of this crossing. The decedent a short time before the accident had driven over the tracks in order to make this trip to the coal mine and the evidence is uncontradicted that he was thoroughly familiar with this crossing. The accident occurred on the return trip from the mine and about 3:10 o'clock in the afternoon. The day was clear. There was no evidence as to whether the truck was loaded or empty at the time of the accident. The decedent approached the crossing from the south and had driven across the south bound track and 69



[his truck was struck while crossing the north bound track by the defendant's north bound passenger train. The train at the time was traveling between (sixty and sixty-five miles an hour and the plaintiff's truck was thrown a considerable distance by the force of the impact. There was one other occupant of the truck and he and the decedent were killed almost instantly.

The plaintiff makes a general charge of negligence against the defendant in the operation of its train and also charges that defendant failed to give the statutory signals and to maintain a lookout for persons at the crossing. Plaintiff also alleges that his intestate was in the exercise of reasonable care for his own safety at and immediately before the time of the accident.

7. Only two eye witnesses testified as to the actual occurrence of the accident — J. C. Schoener, who testified for the plaintiff, and F. A. Newman, who testified for the defendant. After crossing the tracks of defendant the north terminus of the "Old Freeburg Road" runs into a state concrete highway. Plaintiff's witness Schoener operated a filling station located on the northeasterly side of this highway at a point about (two hundred forty feet northeasterly of the crossing. Schoener testified that he was looking out of the window of his filling station in the direction from which the decedent was approaching the crossing; that he saw the decedent drive up to about (twenty feet from the south bound track and get out and "stand up on the running board and look over the cab to see if there was any train coming from the north or south;" that decedent then got back in his truck and drove across the tracks "in extra low gear" until he was struck by the defendant's train. The defen-





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dant's witness Newman was the fireman on the train in question. He testified that he was on the left side of the engine; that he first saw the truck when it was about seventy-five feet from the crossing and at a time when the train was about a quarter of a mile from the crossing; that the truck was traveling about ten or fifteen miles an hour and did not stop but kept on at the same "gait", and that no one got out of the truck and stood on the running board.

Schoener, as well as a number of other witnesses for the plaintiff, testified that weeds and brush had grown up along the south side of the defendant's tracks and right of way and east of the crossing. The height of the weeds and brush was variously estimated at from five to eight feet. One witness testified that there were trees all along the south right of way in height from eight to twenty feet, and another witness testified that "you pretty near had to get up to the railroad before you see a train approaching."

To offset this testimony defendant introduced a number of photographs which were taken the day after the accident at a time when there was no change in physical conditions. In considering these photographs it must be noted the record is silent as to measurements, that is, as to the width of the right of way, the width of the roadbed, and the distance between the different tracks and rails. The record is also silent as to the grade of the highway compared to the adjoining land as such highway led up to the tracks. These photographs were 9-1/2 by 7 inches and are very clear. Four of these pictures were taken at varying distances of fifty feet, one hundred feet, one hundred fifty feet and two hundred feet southerly of the center of the north bound track, and at points on "Old Freeburg

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Road" five feet distant from the east edge of such road, with the camera facing easterly in the direction from which the train approached the crossing, and raised between five feet and five feet two inches above the ground by means of a tripod. It was stipulated at the trial that a notation on the back of each photograph showed the correct position of the camera at the time such photograph was taken. The photographs show or tend to show there was no brush, weeds or trees in any close proximity to this crossing that could obscure the view of the approaching train. The photograph taken fifty feet south of the center of the north bound track shows or tends to show an open and unobstructed view down the tracks and along the right of way for a distance of approximately (thirty-seven hundred 3, 700 feet east of the crossing. The photographs taken (one hundred 100 feet and (one hundred fifty feet from the center of the north bound track both show or tend to show an unobstructed view in the direction from which the train approached for a distance of at least (twelve hundred nineteen feet. The fourth photograph taken (two hundred feet south of the center of the north bound track shows or tends to show an unobstructed view down the tracks except for certain telephone poles spread some distance apart and located south of the right of way and parallel to the south bound track. The railroad right of way is elevated a number of feet higher than the level of the "Old Freeburg Road" and in this last photograph the rails of the tracks are visible from the road for a distance of several hundred feet east of the crossing. The photographs speak for themselves and show or tend to show a clear and accurate picture of the physical surroundings.



The plaintiff's intestate was clearly under a duty to exercise reasonable care for his own safety in approaching the defendant's railroad crossing. This duty has been defined many times by our courts. It includes the use of both sight and hearing by a person approaching a known railroad crossing. (Carlin v. The Grand Trunk Western Ry. Co., 243 Ill. 64; Provenzano v. <sup>Illinois Cent. R. Co.</sup> I. C. R. R. Co., 357 Ill. 192; Greenwald v. <sup>re</sup> B. & O. R. R. Co., 332 Ill. 627.)

The law will not tolerate the absurdity of allowing a person to testify that he looked and did not see a train when the view was unobstructed and where, if he had properly exercised his sight, he must have seen it. (Greenwald v. <sup>Baltimore & C.</sup> B. & O. R. R. Co., 332 Ill. 627; DeBow v. <sup>Cleveland, C., C.</sup> C. C. C. & St. L. Ry. Co., 245 <sup>Ill.</sup> App. 158; Kennedy v. Alton Granite & St. Louis Trac. Co., 180 Ill. App. 146.)

X By its verdict the jury necessarily found that decedent at the time in question was in the exercise of reasonable care for his own safety. After a careful examination of all the evidence, we feel the verdict is clearly and palpably contrary to the manifest weight of the evidence. Because the case is to be tried again, we refrain from further commenting on the evidence.

Only two other alleged errors require our attention. Complaint is made of the giving of an instruction virtually in the language of the Statute (Sec. 1, Ch. 70) which provides for the survival of a cause of action in the event of death, and of an instruction in the language of the Statute (Sec. 59, Ch. 114) requiring a bell and whistle to be placed and kept on a locomotive. There was no error in the giving of these



instructions. (Doming v. City of Chicago, 321 Ill. 341;  
Minnis v. Friend, 360 Ill. 328.)

Under the law, we are required to and do reverse and  
remand the cause for a new trial. (Shutan v. Bloomenthal,  
371 Ill. 244. )

Reversed and remanded.

Abstract





## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
 in the year of our Lord one thousand nine hundred and  
 thirty-nine, within and for the Second District of the  
 State of Illinois:

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 I.A. 225

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BE IT REMEMBERED, that afterwards, to-wit: On  
 the Opinion of the Court was filed in the Clerk's Office of  
 said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A. D. 1938.

EMMA ADOLPHSON,

Appellee.

vs.

RICHARD RUSSELL,

Appellant. )

APPEAL FROM THE CIRCUIT  
COURT OF STARK COUNTY

DOVE, J.

This is an appeal by the defendant from a judgment entered against him in the circuit court of Stark County on the verdict of a jury, in the sum of \$6,500.00 for personal injuries sustained by the plaintiff in an automobile accident which occurred on July 17, 1935.

The complaint alleged that the plaintiff, a minor, was, on the evening of July 17, 1935, at the hour of ten o'clock, lawfully riding, with the permission of the defendant, on the running board of defendant's automobile. That the defendant was then and there driving his automobile in an easterly direction along a graveled highway about one-half mile east of the Village of Speer. That a cloud of dust hung along said highway which the headlights

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of the automobile only penetrated a few feet. That a buggy was moving slowly along the right side of said highway. That the defendant had knowledge of the graveled condition of the road and of the dust, and knowing that he could see but a few feet ahead and that others were traveling on said road, and being conscious that his conduct might naturally result in injuries to others and with an entire absence of care for the person or property of others, and with a conscious indifference to surrounding circumstances and with wilful disregard of consequences, wantonly and recklessly drove his automobile at a speed of sixty miles an hour along said highway, and in attempting to pass said buggy struck the same and as a result thereof the plaintiff was severely injured.

In his answer the defendant admitted that the plaintiff was a minor and that he, the defendant, was the owner of the automobile in question and operated and controlled it upon the night in question. In his answer he alleged that the plaintiff was riding on the right running board of his car without permission from him and that he had ordered the plaintiff to stay off of said running board. That plaintiff knew that a cloud of dust hung along said highway and that said road was a graveled uneven road and that other vehicles might be using said highway. That plaintiff jumped on said running board, without the permission of the defendant, and contrary to his express command and direction. That the plaintiff knew all the conditions of the highway as set out in the complaint and with an entire absence of care for her own safety and with a conscious indifference to circumstances, and with a wilful disregard of



the consequences, wantonly and recklessly left a place of safety and placed herself upon the right running board of the automobile of defendant, contrary to his express order and direction, and that the injuries of the plaintiff were the result of her own wilful, wanton and reckless misconduct.

The evidence discloses that on the evening of July 17, 1935, a group of young people, members of the Christian Endeavor of the Congregational Church, met at the Crady country home a couple of miles east of the Village of Speer. About nine-thirty o'clock they decided to hold a so-called scavenger or treasure hunt and were given instructions by Etta Davidson, who outlined the program. Six of the young people left the Crady home and got into defendant's two-door Ford automobile. At that time the defendant was twenty-two years of age and accompanying him were Betty Stuart, fourteen years of age who rode with the defendant in the front seat. In the rear seat Iva Newell, Roy Crady, Kenneth Crady and Emma Adolphson, the plaintiff, were riding. The defendant drove the car north from the Crady home on a concrete state highway for about one mile and then turned west on a graveled road which leads into the Village of Speer. After they reached the Village of Speer they stopped at the Campbell residence, where the plaintiff, Emma Adolphson, and Kenneth Crady got out of the back seat and went into the house, and then returned to the car. The defendant, Russell, was sitting at the wheel, and Betty Stuart was sitting beside him in the front seat with the other two members of the party in the rear seat. The evidence showed that the party had some conversation as to the next stop and decided to stop at the home of the plaintiff for an article which they desired, her home being about three-fourths of a mile east of the Village of Speer

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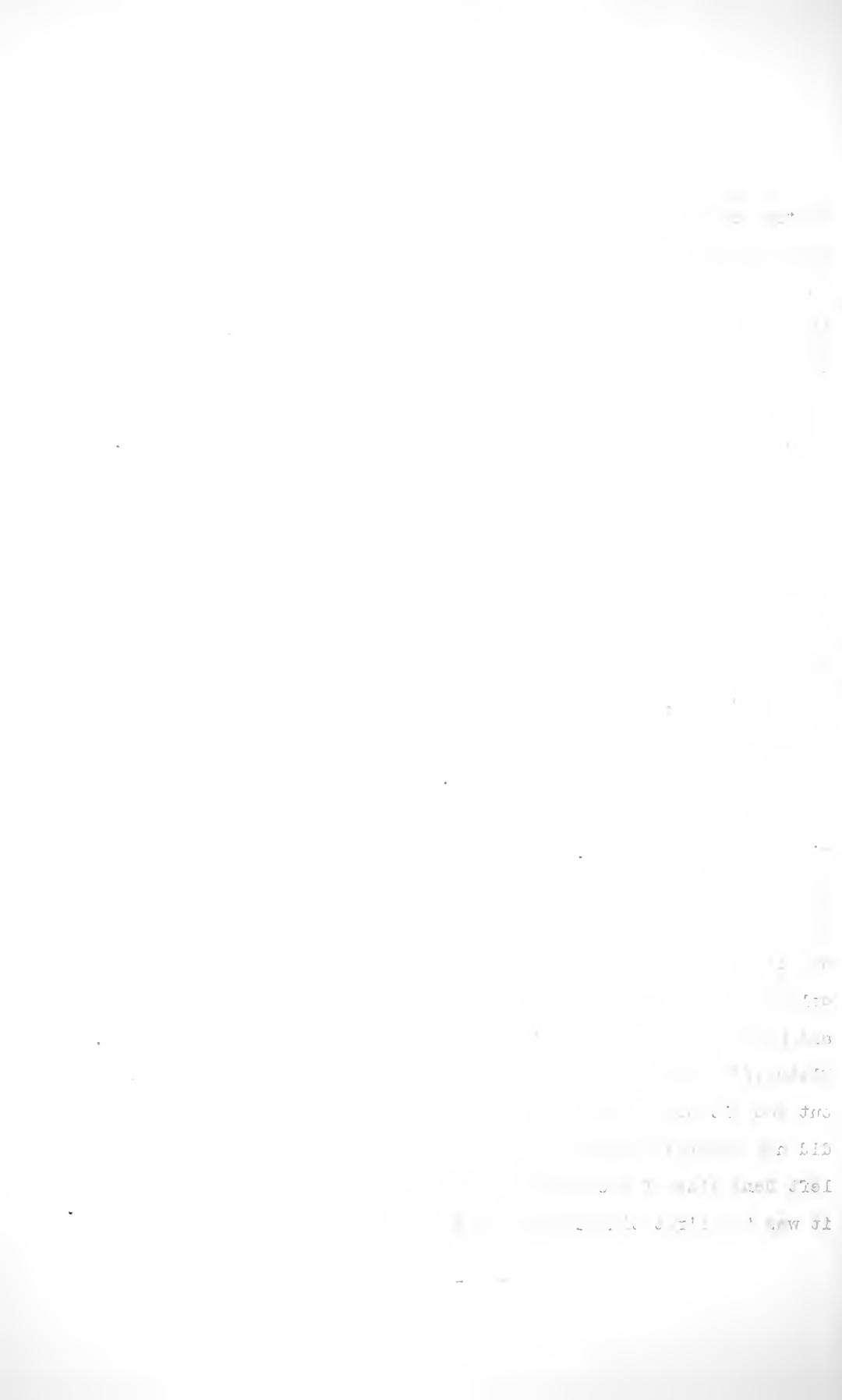
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on the graveled road. It was a hot, dry summer evening and the moon was out, and no breeze stirring. After deciding to go to the Adolphson home, Kenneth Crady and Emma Adolphson stepped on the running board on the right side of the automobile. The defendant asked them if they were getting in and they replied that they would ride outside where it was cool. The car then proceeded toward the home of the plaintiff. The defendant was driving. Betty Stuart was in the front seat with him, Iva Newell and Roy Crady were in the rear seat and the plaintiff and Kenneth Crady were standing on the right running board and when they had traveled about one-half the distance between the Village and plaintiff's home, the right center and right rear fender of the automobile came in contact with the left rear end of a surrey going in the same direction. The right car window was about half-way down and the plaintiff was holding on with her left hand and did not fall from the car until it stopped. As a result of the collision plaintiff sustained fractures of the pelvic bones and of the right tibia and fibula. The plaintiff testified that after crossing the railroad track she put her head inside the car, through the window, and said it was cold, and when she withdrew her head and looked ahead she saw the surrey and screamed and then the collision occurred. That she clung to the car until it stopped and had no clear recollection of what transpired after the impact. Plaintiff further testified that the lights on the car were on, but she did not know whether they were bright or dim, that she did not observe whether the surrey was traveling on the right or left hand side of the road or whether it had any lights, that it was the first time she had ever ridden on a running board,



that she was scared and was not paying any particular attention to anything, as her mind was on the scavenger hunt.

Betty Stewart testified that she was fourteen years of age at the time of the accident and was riding in the front seat of the defendant's automobile at the time of the accident and that after plaintiff and Kenneth Crady came out of the Campbell house she saw them get onto the running board of the defendant's automobile and she said to defendant that they, plaintiff and Kenneth, should get inside of the car, but the defendant, Russell, did not say anything. That the car was traveling between twenty-five and thirty-miles per hour as it crossed the railroad track, and the speed was then increased to between forty and fifty miles per hour. That the road was rough and a heavy dust was in the air. That the lights of the car were on and you could see about fifty feet ahead and when they had proceeded to about one-half the distance between the tracks and the Adolphson home they hit the surrey but she did not see it. Upon cross examination, this witness testified that shortly after the accident defendant Russell said that they were only going thirty miles an hour at the time of the accident and that she also thought so at that time and so stated, but since then she changed her mind and at the time of the trial thought the car was traveling as much as forty miles an hour. After the accident she signed a statement to the effect that the speed of the automobile at the time of the accident was twenty-five or thirty miles an hour.

Mrs. Iva Miller, who prior to her marriage was Iva Newell, testified that at the time of the accident she was seventeen years of age and was in the car at the time of the accident.

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That when they crossed the railroad track east of Speer, they were traveling between twenty and twenty-five miles an hour, and after that the speed increased. That the lights on the automobile were on but she could see ahead on the road only about forty or fifty feet on account of the dust and that in her best judgment the automobile after it passed the railroad tracks was traveling around forty miles an hour. That she did not see the surrey before the collision as she was conversing with the boy in the rear seat with her. In a statement made shortly after the accident, she fixed the speed of the car at about thirty miles per hour and stated that she recalled the defendant had requested the plaintiff to ride inside the car but upon the trial she did not recall defendant making this request of the plaintiff.

Roy Crady testified that he was riding in the back seat with Iva Miller at the time of the accident, that after the car crossed the railroad track it gained speed, and that there was a heavy dust on the road. That just before the accident the speed was between thirty-five and forty miles an hour, and that they could see about one hundred and fifty feet ahead, but that the vision was somewhat blurred. That he did not see the surrey in question until they were right on it, and that then the car swerved to the left and did not know how far the automobile traveled from the time it collided with the buggy until it stopped. About two days after the accident this witness made a written statement in his own handwriting that the car in which he was riding was going between twenty-five and thirty miles an hour and at that time he so believed but that at the time of the hearing his judgment was that the car was going between thirty-five and forty miles an hour.

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Kenneth Crady testified that he was riding on the running board immediately behind the plaintiff. That after they left the Campbell home they both got on the running board and that he did not remember whether anything was said then about getting into the car. That as they crossed the railroad track the speed of the car was around twenty miles an hour, and that after that they picked up speed. That there was dust on the highway and the lights showed about fifty to sixty feet ahead. That immediately prior to the accident the car was traveling around forty or forty-five miles an hour. That the first time he noticed the surrey was when they hit it. That it had no lights. That the collision threw him off of the car, and he rolled about fifty feet ahead of the buggy. That the defendant's car was being driven on the right side of the road, and that the traveled portion of the road was about twenty-two to twenty-four feet wide. That the day following the accident he signed a statement to the effect that the speed of the defendant's car was twenty-five to thirty miles an hour, but that since then he has changed his opinion.

Mrs. Leah Pritchard who was riding with her husband in the surrey which was struck by defendant's automobile testified that she was seated on the right side, in the front seat, beside her husband, and that in the rear seat her daughter, Hazel Pritchard, was sitting on the right side, and her son, Howard Pritchard, on the left side.

That they had been to a ball game and were returning home. That the road was about thirty-four feet wide from ditch to ditch, and the right wheel of their surrey was out in the weeds on the right side of the road when it was struck and that defendant's

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the road when it crossed the road.



car was traveling, in her opinion, between fifty and sixty miles per hour. That the surrey was not turned over as a result of the collision and she did not go up to the car, but remained in the surrey.

Joe Pritchard testified that he was driving his surrey on the night in question, that it had no lights but had two red reflectors on the rear axle.

Howard Pritchard, the son of Joseph Pritchard, who was riding in the rear seat of the surrey testified that he was sixteen years of age and noticed the lights of the defendant's automobile as it approached from the rear, and that it was in the middle of the road about eighty rods back when he first saw it, and was traveling between fifty and sixty miles an hour and after the collision stopped about four hundred feet from the point of collision and that the surrey in which he was riding did not move over ten feet after it was hit.

The several statements signed by Iva M. Newell, now Iva Miller, and Roy Grady made two days after the accident occurred, were to the effect that defendant was driving his car carefully at thirty miles per hour when it overtook the surrey which had no lights on it; that the air was filled with dust and that the plaintiff and Kenneth Grady were riding on the right running board of the car and that the defendant had asked them to ride inside the car. These statements were offered and admitted in evidence as was also the affidavit executed by Kenneth Grady shortly after the accident in which he swore that he and the plaintiff got on the right running board of defendant's car, and that defendant told them to get in the car, but since they were only riding a short distance he and the plaintiff decided to ride on the running board. He further swore that defendant was driving

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carefully at about twenty-five to thirty miles an hour, that the road was dusty and the surrey had no lights upon it; that he was looking east but did not see any vehicle and that he was suddenly knocked off the running board when they struck the surrey and that as they proceeded along the road, no one in the party made any protest as to the speed or manner in which the automobile was driven before or after the time of the accident.

Richard Russell, the defendant testified that when the plaintiff and Kenneth Crady came out of the Campbell residence he asked them if they were getting in, and that they said they would ride out there where it was cool, and that they were going to stop at plaintiff's home. That as he proceeded, after he crossed the railroad tracks, his speed was thirty miles an hour up until the time of the accident. That as he drove east he did not see any traffic on the highway and did not pass any vehicles going in that direction. That he struck the Pritchard surrey as it was traveling east, on the right side of the road. That he was also going east traveling on the right side of the road and that the road at the point of the accident was about twenty feet wide. That he had his lights on and could see forty or fifty feet ahead. That upon seeing the surrey, when it was forty or fifty feet away, he swerved the car to the left and applied the brakes lightly. That he slackened the speed of his car and let it coast to a stop and did not stop instantly, because he heard the plaintiff scream and realized that she was hurt, and he knew that if he stopped suddenly he would slide the car and possibly run over the plaintiff. That in his best judgment car traveled one hundred fifty feet after the collision. That no one in the car, or on the running board, addressed any remarks to him from the time he left the railroad tracks, until the accident occurred.

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That after the accident, and in plaintiff's presence, he stated that he was only going thirty miles an hour and no one in the group at that time said anything different. That he did not know of any horse and buggy travel on the road in question in that year, and that he had traveled the road on numerous occasions.

From all the evidence found in this record we do not believe this judgment can be sustained. All the occupants of the car were engaged in a common object. Appellee voluntarily chose to ride on the running board of this automobile and by so doing, under some authorities was guilty of contributory negligence and could not recover as a matter of law. *Schomaker v. Havey*, 291 Pa. 30, 139 Atl. 495, 61 A. L. R. 1241; *Smith v. Ozark Water Mills Co.*, 215 Mo. App. 129, 238 S. W. 575. It is true appellant permitted appellee to ride there and in so doing he made a mistake, but she was riding there of her own volition and not at the request or direction of appellant. Appellant may have driven carelessly but nothing that the appellant did in driving the car, either in the manner in which he drove it or the speed at which it was being driven evoked a protest from appellant or from any of the other passengers. There is nothing in this record to indicate that he was indifferent to the duty which he owed his guests or was guilty of wilful or wanton conduct as he proceeded along the highway just before and at the time of the collision.

If, however, it be conceded that appellant was guilty of wilful and wanton conduct, appellee was likewise guilty in voluntarily riding on the running board and under the doctrine announced in *Willgeroth v. Maddox*, 281 Ill. App. 480 is not entitled to recover. According to her testimony she could see fifty feet ahead of the automobile upon the running board of which she was riding as

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in the first part of the year, the weather was very dry and the crops were very poor. However, in the second part of the year, the weather was very wet and the crops were very good. The total yield was 1000 bushels.

the car proceeded east on the gravel road. She had lived on that road for many years before the time of the accident and it was to her home that she and her company were going when the accident occurred. She knew of the condition of the highway and the travel upon it and both she and appellant had the right to assume that no unlighted surrey was being drawn along that highway.

It is true as contended by counsel for appellee that wilful and wanton conduct depends upon the facts and circumstances of each particular case and that whether defendant was guilty of wilful and wanton conduct and if so whether such conduct was the proximate cause of appellee's injury and whether appellee's conduct was such as to bar a recovery are all questions of fact for the jury, but from a consideration of all the evidence we are clearly of the opinion that the verdict of the jury is manifestly against the weight of the evidence and that the trial court erred in denying appellant's motion for a new trial. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.





STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 226

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



Gen. No. 9465

Agenda No. 6

In the Appellate Court of Illinois  
Second District

October Term, A.D. 1939

Frank O. Lowden, et al, trustees  
of the estate of The Chicago,  
Rock Island and Pacific Railway  
Co. etc.,

Appellees,

vs.

E. L. Mead, et al.,

Appellees.

First National Bank of Geneseo,  
Illinois, and Liberty Trust and  
Savings Bank of Durant, Iowa,

Appellants.

Appeal from the Circuit Court  
of Grundy County

HUFFMAN - J.

The origin of this suit was an attachment proceeding by appellees against a co-partnership consisting of E. L. Mead, W. A. Bayes, and R. B. Mead, and against E. L. Mead, individually. Pursuant to such suit the sheriff attached about 2000 head of sheep which were then at the Stockdale yards about three miles west of the city of Morris, in Grundy county. Subsequently the First National Bank of Geneseo, Illinois, and the Liberty Trust and Savings Bank of Durant, Iowa, each filed intervening petitions in the attachment proceedings, wherein it was set up that the sheep held by the sheriff under the writ of attachment were the property of the banks by virtue of chattel mortgages held by them. A trial of the rights of property was had before the court who found in favor of appellees as against the intervening petitioners and dismissed said petitions. The interveners bring this appeal.

The trial court based its finding upon the fact that the intervening petitioners failed to prove the sheep in question were the same sheep as described in their mortgage. This court has fully reviewed the evidence and is in accord with the finding

In the Court of Illinois

Plaintiff

Defendant

Frank O. Lowden, et al.,  
of the estate of J. W. Lowden,  
Rock Island and Eastern Illinois  
Co., etc.,

Appellee,

vs.

as.

of the

F. L. Mead, et al.,

Appellant,

First National Bank of Chicago,  
Illinois, and Liberty National  
Savings Bank of Duquoin, Ill.,

Appellants.

HURTMAN - 1.

The origin of this suit as an attachment proceeding

appears against a corporation consisting of F. L. Mead,

W. A. Hayes, and F. L. Mead, and against F. L. Mead, individually.

Pursuant to such writ the sheriff attached about 1900 a lot of sheep

which were then at the stock yard some about three miles west of

the city of Morris, in Rock Island County. Subsequently the sheriff

National Bank of Chicago, Illinois, and the Liberty National

Savings Bank of Duquoin, Ill., each filed in certain proceedings

in the attachment proceedings, wherein it was set out that the

sheep held by the sheriff under a writ of attachment were the

property of the banks by virtue of certain mortgages held by them.

A trial of the rights of the banks was had before the court who

found in favor of appellees as against the intervening petitioners

and dismissed said petitioners. The intervenors bring this appeal.

The trial court based its finding upon the fact that the in-

tervening petitioners failed to prove the sheep in question were

the same sheep as described in their mortgage. This court has

fully reviewed the evidence and is in accord with the finding

of the trial court on the above question of fact. The parties to the suit are conversant with the evidence in the case and we do not consider a review of the same necessary.

The court gave judgment against the intervenors for the following costs: sheriff's costs, \$11.85; witness fees \$ 100.35; and the sum of \$200.00, as part of the expenses of maintaining the sheep during the pendency of the intervening petitions. Appellees bring a cross-appeal with respect of that portion of the court's judgment for \$200.00, going toward the expense of maintaining the sheep during the pendency of the suits. Appellees urge in this regard that the cost of maintaining the sheep was approximately \$1000.00, and that by virtue of chapter 11, of the statute, on attachments, the intervenors are liable for all expenses connected with maintaining the sheep during the pendency of their suits, and that same should be included in the costs adjudged against them.

The trial court on December 5, 1938, ordered the sheriff to sell the sheep on the Chicago market and bring the money into court to await disposition.. The intervenors herein were confined to claiming the property in their own right. They did not stand in the position of an original party. They could not contest the plaintiff's claim against the defendants nor interpose a defense that was personal to the defendants. They were not concerned with whether the court and the officer who served the writ acted legally. The burden was upon them to prove their right to the sheep attached, by virtue of their mortgages, and to entitle them to judgment they must prove their rights in the property to be superior to those of the attaching creditor.

The costs in a proceeding to try the right to property, levied on under attachment and claimed by a third person, have no connection with the main action, and as a general rule, must be borne by the unsuccessful party to such proceedings. In some instances it is

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difficult to express in general terms any principle that will define the limitations to an intervenor's liability for costs. It can be said with confidence that they are liable for costs incurred by reason of a vexatious resistance to the proceeding. But sometimes an intervenor may find himself in a position where by the exercise of good judgment he may make claim to chattels which he believes to be covered by a mortgage, such as was done in this case. Under such circumstances such an intervenor can not be considered vexatious in asserting a claim which he honestly believes to be just. Here the defendant co-partnership was dealing in sheep, buying them throughout the west and selling them as fast as they had an available and satisfactory market. The Stockdale feeding yards was a general gathering place for livestock destined for the Chicago market. The co-partnership was indebted to the intervenor, the First National Bank of Geneseo, Illinois, in the sum of \$24,500.00, and to the intervenor, the Liberty Trust and Savings Bank of Durant, Iowa, in the sum of \$19,605.00. It appears that the sheep at the above yard which appellees had attached, originated from various points ranging from the state of Oregon to Texas. We are in accord with the finding of the trial court that the intervenors failed to prove the sheep attached were the same as those described in their several mortgages; and we are not disposed to increase the amount of cost taxed against them as expense for maintenance of the sheep during the progress of this case.

The question of the legality of the mortgages of the intervening petitioners was before the court, but such question did not control the court's action in the disposition of this case and we do not consider a determination of such question necessary in this appeal. The intervening petitioners claim that appellees failed to show they were judgment creditors of the defendants in the attachment proceedings. The record shows a judgment by the court in favor



of appellees and against such defendants for \$6577.58, which judgment is unquestioned and stands in full force and effect. Appellees filed motion to dismiss the appeal which motion was taken with the case. In consideration of the disposition of the appeal as made herein, it becomes unnecessary to consider the motion. Cost of additional abstract to be taxed against appellants.

The judgment of the trial court is affirmed.

Judgment Affirmed.

of appeals on the basis of the facts of the case, which judge-  
ment is unquestioned. It is the duty of the Appellate  
Court to determine the facts of the case, and to decide with the  
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STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 226<sup>2</sup>

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On the  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A. D. 1938.

ELMER J. ELLEFSON, Admr. of the  
Estate of Sophia Ellefson,  
deceased,

Appellee,

vs.

WARREN M. MILLER,

Appellant.)

APPEAL FROM THE CIRCUIT

COURT OF WINNEBAGO COUNTY

DOVE, P. J.

This is an appeal from a judgment for \$1100.00 rendered in the Circuit Court of Winnebago County in favor of the plaintiff Elmer J. Ellefson, as administrator of the estate of Sophia Ellefson, deceased, against Warren M. Miller, a physician and surgeon of Rockford, Illinois, for malpractice.

The complaint consisted of three counts. The first two counts charged that on the 31st day of December, 1936 the deceased, then sixty-four years of age and in good health, went to the office of the defendant, an eye, ear, nose and throat specialist for the purpose of having him remove an apricot skin which had lodged in her esophagus. The negligence charged was that while attempting to remove the skin from the esophagus, defendant unskillfully, negligently and carelessly punctured the wall of said esophagus just above the stomach opening, with forceps or with an

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esophagoscope and as a proximate result thereof plaintiff's intestate developed mediastinitis, and on the 4th day of January, 1937 died.

The third count, among other things, averred that it became the duty of the defendant prior to the operation to study and diagnose the condition of the esophagus of plaintiff's intestate, including the use of X-ray pictures and fluoroscopic examinations which were then and there available to the defendant; that he negligently and unskillfully failed to use said X-ray upon said deceased, and did unskillfully and negligently fail to use fluoroscopic methods in the determination of the location of said skin and did unskillfully and negligently proceed to use upon said esophagus, an esophagoscope which he pressed with undue force and violence upon the walls of the said esophagus, thereby causing the instrument to pierce the wall of said esophagus and to make a puncture therein into the chest area of said Sophia Ellefson in the media portion thereof and as a proximate result of said conduct, the deceased developed mediastinitis and died.

The evidence discloses that in December 1936 plaintiff's intestate Sophia Ellefson, a woman sixty-four years of age, was visiting in the home of her son Elmer J. Ellefson in Rockford and on the morning of December 31st, ate some cooked dried apricots and a portion of one lodged in her esophagus. She was alone at the time and upon her daughter-in-law's return home from work between four-thirty and five o'clock that afternoon, plaintiff's intestate advised her of this fact and she was immediately taken by automobile to the office of appellant, arriving there about five or five-thirty in the afternoon; that the office of appellant was on the second floor of the May Building and Mrs. Ellefson walked from her home to

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the automobile and from the automobile up the stairway to appellant's office; that appellant was not in his office when they arrived but came in shortly thereafter and plaintiff's intestate told him that she had something, probably an apricot, stuck in her throat and that it got there about ten o'clock in the morning of that day. The evidence is conflicting as to the condition of Mrs. Ellefson at the time she came to appellant's office. According to the testimony of appellant and his office assistant and nurse, she was in a serious condition, continually coughing and choking, that his examination disclosed she had a rapid heart and her condition was so serious that it would not justify removing her to a hospital as she was in need of immediate relief and came into his operating room supported by her daughter-in-law. According to the testimony of the daughter-in-law, Mrs. Ellefson was not, when she arrived at the office of appellant or before she got upon the operating table, coughing or choking or in distress and her condition was normal.

The record further discloses that appellant had an X-ray machine in his office but no facilities for taking a fluoroscopic picture. After his examination of Mrs. Ellefson he told her and her daughter-in-law that there was an obstruction in her esophagus and that it would have to be removed surgically, that ordinarily he would do this work in the hospital, that he had an esophagoscope and other appropriate instruments at his office and according to his testimony and that of his office assistant and nurse her condition was so serious that it would not justify her removal to the hospital and he proceeded to remove the substance, using an esophagoscope with forceps and two pieces of apricots were removed. Upon leaving

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appellant's office she was taken, by automobile, at appellant's direction to St. Anthony's hospital in Rockford and on January 4th following died of mediastinitis. Upon post-mortem examination the esophagus showed a considerable dilation and in the lower part there was a thinned out section, oval in shape, about an inch in length and a half inch in width and in this section there was a hole extending through the wall of the esophagus about two or three millimeters in diameter. Beyond this hole and at the very lowest portion of the esophagus some particles of apricots and other food stuffs were found. There was no cancer but the condition of the esophagus evidenced to Dr. Lang who performed the post mortem that Mrs. Ellefson must have suffered from some inflammatory ulcer on the lower portion of the esophagus for some time.

According to the testimony of Dr. Michael Ohlson, a son-in-law of plaintiff's intestate, who has been engaged in the general practice of medicine since 1929 and a resident of Monticello, Wisconsin, the proper procedure to have been followed by appellant would have been to have located the foreign substance by X-ray and the fluoroscope with barium solution before using the esophagoscope. Dr. Benjamin Brindley of Madison, Wisconsin, in answer to a hypothetical question propounded by counsel for appellee, gave it as his opinion that the treatment outlined in the hypothetical question was not that which a good physician and surgeon would use under the same or similar circumstances.

Dr. Justin Steurer, an eye, ear, nose and throat specialist of Rockford and an expert in the use of the esophagoscope, testified on behalf of appellant in answer to hypothetical questions that the patient had a spontaneous rupture of the esophagus prior to the time appellant operated, that a fluoroscopic examination would not

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be the usual or customary thing for surgeons in Rockford to do under similar circumstances and that under the conditions assumed, it would not have been good medical practice to have sent the patient to a hospital first. Dr. J. J. Potter, another expert in the use of the Esophagoscope, in answer to appellant's hypothetical question, gave it as his opinion that the patient described was a very sick woman when brought to appellant's office and was suffering from a narrowing of the lower end of the esophagus, the wall of which had become quite thin and that the treatment given and the course pursued by the operating surgeon was that of a careful, skillful physician and surgeon.

Inasmuch as this judgment must be reversed, we will not set out the evidence at length or comment upon it. Instruction number two given by the court at the request of appellee told the jury that it was the duty of the defendant at the time he was treating Sophia Ellefson to use the regular and approved treatment for the ailment that she was then and there suffering and to at all times use that degree of knowledge, treatment and care that a good physician and surgeon would use under all similar cases and under like circumstances. The instruction then stated that if the jury believed from a preponderance of all the evidence that the defendant failed to use this degree of care while treating Sophia Ellefson and that such failure was the proximate cause of the injury to her, then the jury may find the defendant guilty. This suit was brought to recover for the alleged wrongful act which caused the death of Sophia Ellefson and not a suit by her to recover for the injuries which she sustained. Perhaps the jury were not misled but the instruction was inaccurate. The word death should have been used



instead of injury. Chase v. Nelson, 39 Ill. App. 53. The fifth instruction should not have been given. It is as follows: "The court further instructs the jury that the defendant Warren N. Miller, having taken the witness stand in his own behalf became the same as any other witness, and his testimony is to be tested by the same tests as that of any other credible witness and you may take into consideration the fact that he is the defendant and interested in the outcome of this lawsuit". This instruction singles out and identifies the defendant and as said in Taylor v. Crowe, 122 Ill. 518; its tendency was to impress the jury with the idea that the Court saw some special reason for discrediting his testimony. An instruction referring to the plaintiff, when given on behalf of the defendant, has been approved where the defendant is a corporation C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9, but where both parties are natural persons it has been held error to give such an instruction. Engstrom v. Olson, 248 Ill. App. 480.

Dr. Brindley in answering a question which called for his opinion as to what would be a proper method and means of diagnosing the ailment of the hypothetical person described in the question stated what he would do. The Court permitted the answer to stand instead of confining the witness to an expression as to what was the proper practice under the facts stated. The court also erred in overruling defendant's motion to strike some of the testimony of Dr. Ohlson, a practicing physician residing at Monticello, Wisconsin, and in permitting some of his answers to stand where he related what he would have done to ascertain the presence or non-presence of an apricot skin in the aesophagus.



As frequently stated by the authorities, the duty which a physician and surgeon owes his patient is to bring to the case at hand that degree of knowledge, skill and care which a good physician and surgeon would bring to a similar case under like circumstances. A physician is not an insurer and proof of a bad result or mishap is of itself no evidence of negligence or lack of skill. *Olander v. Johnson*, 258 Ill. App. 89, and cases there cited. In the instant case the record discloses that appellant was licensed to practice medicine in Illinois in 1914 after graduating from the medical school at the University of Chicago and Rush Medical College, that he has continuously practiced his profession and specializes in eye, ear, nose and throat and endoscopy. He has attended Dr. Chevalier Jackson's Clinic in Philadelphia and studied under Dr. Jackson, who is an outstanding authority on the subject of endoscopy. He has performed many operations with the esophagoscope and bronchoscope and maintains and has maintained in Rockford for many years a well equipped office. He testified at length as to what transpired when Mrs. Ellefson came to his office for treatment and what he did in performing the operation. He testified that in so doing he followed the usual and customary procedure followed by physicians and surgeons in Rockford engaged in the same character of work. He further testified that he did not know whether he punctured the esophagus of Mrs. Ellefson or not but did not think so and that it was his opinion that Mrs. Ellefson suffered a spontaneous rupture of the esophagus due to its weakened walls and the fact that she had an ulcer.

We are unable to approve this judgment and for the errors indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 227

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

OCTOBER TERM, A.D. 1939.

PEOPLE OF THE STATE OF ILLINOIS FOR  
THE USE OF CARY WHEATON BANK, a  
corporation, Conservator of the Estate of  
Simon Blazek, Insane,

Plaintiff-Appellee,

vs.

AMOS B. SHEPARD, ROBERT FURCHSON, GEORGE L.  
ALLMART, HARRY G. BEVER, HAROLD P. DUFFIN.

Defendants,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY,  
a corporation,

Defendant-Appellant.

Appeal from the  
Circuit Court of  
DuPage County,  
No. 36-679

WOLFE, P. J.

Amos B. Shepard had been the Conservator of Simon Blazek for several years. He petitioned the County Court of DuPage County, to sell certain lands belonging to his ward. A hearing was had upon the petition and an order entered giving him permission to sell the land. The order also contained a statement, "That the court has required an additional bond in the sum of \$1500.00 to be filed by the Conservator, and has filed his bond in that amount with the United States Fidelity and Guaranty Company, as surety, which said bond has been approved by this court." The land petitioned to be sold, was not sold by the

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"The first political court." The first political court was the  
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Conservator. The court required the Conservator to make a report and found that he was short in his accounts in the sum of \$3,996.80. He was removed as such Conservator and the Gery-Wheaton Bank was appointed Conservator of the Estate of said Simon Blazek.

Before the bond in question was signed, the former Conservator had given other bonds to secure the faithful performance of his work. Suit was started against the various sureties, and the only question now before the court, is the construction of the bond of the United States Fidelity and Guaranty Company. The bond in question is as follows: Conservator's Special Bond "Know All Men By These Presents, That we Amos B. Shepard, principal, United States Fidelity and Guaranty Company, as sureties, of the County of DuPage, and State of Illinois, are held and firmly bound unto the People of the State of Illinois, for the use of the estate of Simon Blazek, insane, in the penal sum of Fifteen Hundred Dollars, current money of the United States, which payment, well and truly to be made and performed, we, and each of us, do hereby bind ourselves, our heirs, executors, administrators and assigns, jointly, severally and firmly by these presents.

"Witness our hands and seals this tenth day of December, A.D. 1931.

"The condition of this obligation is such, that if the above bounden Amos B. Shepard, who has been appointed Conservator of the estate of Simon Blazek, shall faithfully account for and pay over the proceeds arising from the sale of real estate belonging to said ward and shall faithfully discharge the office and trust of such Conservator according to law, and shall make

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a true inventory of all the real and personal estate of the ward that shall come to his possession or knowledge, and return the same unto the Probate Court of DuPage County, at the time required by law, and manage and dispose of all such estate, according to law, and for the best interest of said ward and faithfully discharge his trust in relation thereto, and to the custody, and render an account, on oath, of the property in his hands including the proceeds of all real estate that may be sold by him, if any, and of the management and disposition of all such estate, within one year after his appointment, and at such other time as shall be required by law, or directed by the Court, and upon removal from office, the restoration of his said ward, or at the expiration of his trust, settle his accounts in said Court, or with the ward or his legal representatives, and pay over and deliver all the estate, title papers and effects remaining in his hands, or due from him on such settlement, to the person or persons lawfully entitled thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

Amos B. Shepard, (Seal)  
United States Fidelity  
& Guaranty Co. (Seal)  
By its Attorney in Fact,  
J. F. Miller. (Seal)

Sealed and delivered in presence of  
Bernard M. Long,  
Clerk of the Probate Court."

The case was tried before the court without a Jury. The Court held that the bond in question was a general Conservator's Bond and entered a judgment against the Surety Company in the sum of \$856.44. It is from this judgment that the defendant insurance

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company alone has appealed the case to this court for review. It is the contention of the appellant that under the bond in question, they are not liable for the default of Amos B. Shepard, as their bond is only a special and limited bond given as surety for the faithful performance of the Conservator in selling and distributing the proceeds of the real estate ordered by the County Court. There is no question that a surety may limit his liability, if he does so, in apt words by the surety contract, but the law is that the intention of a surety in signing a bond must be adopted as expressed in the bond itself. Corn Belt Bank vs. Maryland Casualty Company, 281 Ill. App. 387; In Re Estate of Cook 282 App. 412; Westfall vs. Albert 212 Ill. 68. If there is no ambiguity in the bond, there is no reason to give it a different construction from the language used in the surety contract, Leshner vs. U. S. Fidelity & Guaranty Company, 239 Ill. 502; Grimes vs. Maryland Casualty Company, 300 Ill. app. 62. It is also a rule of law that in construing a surety contract, if the bond is prepared by the surety company, it will be more strongly construed against the company.

The bond was given, in pursuance to the order of the County Court requiring the Conservator to give an additional bond, and it is our conclusion that the surety company did not limit its liability to the proceeds of the sale of the real estate, but the bond is general in form and the court properly held that the company was liable for their proportionate share of the default of the Conservator.

The judgment of the Circuit Court of DuPage County is hereby affirmed.

Affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

200 T.A. 227<sup>2</sup>

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
OCTOBER TERM, A.D. 1939.

JAMES CONNETT, )  
Plaintiff-Appellee, )  
vs. )  
WINFIELD S. WINGET, )  
Defendant-Appellant. )

Appeal from  
Circuit Court,  
Peoria County.

WOLFE, P. J.

James Connett, the appellee, in this case, started suit in the Circuit Court of Peoria County, against Winfield S. Winget for damages which he claimed he sustained through the negligent operation of an automobile of the defendant. Winget was driving his car and Connett and one A. Y. Bartholomew were riding as passengers. The declaration consists of three counts, after the preliminary allegations, each count contains the following: "Plaintiff further states that at said time and place he was then and there a passenger in the automobile of said defendant, at which time and place the said plaintiff and the defendant were upon an errand of business. Said defendant was under the duty to exercise ordinary care and caution for the safety of the plaintiff." Then follows the allegations of the negligent operation of the automobile by the defendant and the injuries to the plaintiff. He claims damages in the sum of \$25,000.00.





The defendant filed an answer and amended answers to the complaint. He denied all acts of negligence, and any liability whatsoever, for the damages to the plaintiff. In addition to the denial of liability, as above stated, the defendant filed an amended answer setting forth the Guest Statute, Section 58A, Chapter 95, of the Motor Vehicle Act, Revised Statutes of 1937, and charged that plaintiff at the time and place mentioned in the complaint, was riding as a guest in defendant's car. The plaintiff did not file a reply, or deny the new matter set forth in the amended answer. The case went to trial before a jury upon the complaint and answer. They found the issues in favor of the plaintiff, and assessed his damages at \$10,000.00. At the conclusion of the plaintiff's testimony, and also at the conclusion of all the evidence, the defendant filed a motion for a directed verdict in his favor. The court took these motions under advisement until after the jury had brought in their verdict, and then overruled the motions for a directed verdict. The defendant then entered a motion for judgment, notwithstanding the verdict, assigning numerous reasons therefor. This motion was overruled. The defendant then filed a motion for a new trial and set forth numerous reasons why this motion should be sustained, but the court overruled this motion. The defendant then filed a motion in arrest of judgment, but did not file any reasons why the judgment should be arrested. This motion was also overruled, and the court then entered judgment on the verdict, in favor of the plaintiff for \$10,000.00, and it is from this judgment that the appeal is prosecuted.

It is first insisted that the court erred in not holding that the complaint does not state a cause of action, and therefore the judgment on said complaint cannot be sustained. The complaint charges that the plaintiff was riding as a passenger in the auto-

charges that the plaintiff was driving at a speed in the auto-  
the judgment on said charges was affirmed. The plaintiff  
that the original judgment was affirmed. The plaintiff  
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mobile of the defendant, and then alleges that the plaintiff ~~and~~ <sup>defendant</sup> ~~went~~ upon an errand of business, and proceeds to charge the defendant with negligence, which caused the plaintiff's injuries. The rule is that a complaint must state facts, which, if proven, would entitle the plaintiff to recover in the case. The plaintiff has alleged that he was a passenger in the car and the law of this State is, that if one is a passenger, he must state facts by direct averments, why he was not a guest, before he can recover for injuries which he may have sustained, unless the driver of the car was guilty of wilful and wanton misconduct, which caused his injuries. Stating ~~that~~ the parties were on "an errand of business," is not such a positive averment as would change his status from a passenger and guest to take the case out of our 'Guest Statute.' This complaint does not charge the defendant with wilful and wanton misconduct. Whether this complaint does or does not state a good cause of action, we do not decide, because the judgment will have to be reversed for reasons hereinafter stated.

The evidence in the case is short, but conflicting, as is usual in contested cases. It is uncontradicted that the plaintiff, the defendant, who is a real estate broker, and Bartholomew, who is also a real estate broker were all going in the defendant's car to inspect the property of a client of Bartholomew's, in anticipation of a trade for plaintiff's property; that as they neared the property, the car of the defendant failed to go up the hill, and ran backwards, and that the plaintiff either jumped, or was thrown out of the car and was injured. The defendant claims he had the property of the plaintiff listed for trade or sale, but the plaintiff emphatically denies this.

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Under the circumstances, we will have to accept the plaintiff's evidence as true, and find as a matter of fact, that the defendant did not represent him as his broker. This being true, and from the other evidence in the case, it seems to us that no other conclusion could be reached, then, that the plaintiff was riding as a passenger and guest in the defendant's car. There was no attempt made to charge the defendant with wilful and want on misconduct, which contributed to the injuries of the plaintiff, and unless the same is charged and proven, the plaintiff cannot recover in this case.

It is therefore our finding that the plaintiff was riding as a guest in the car of the defendant, and that the judgment of the trial court should be reversed.

Reversed.



STATE OF ILLINOIS, }  
 SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 228

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On        1939  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
OCTOBER TERM, A.D. 1939.

L. N. Taylor,  
Plaintiff-Appellant.

VS.

Charles P. Mogan, Trustee, Chicago & Northwestern Railway Company,

Defendant-Appellee.

Appeal from  
Circuit Court  
Lee County, Illinois,  
Law No. 1547.

WOLFE, P. J.

The appellant, L. M. Taylor, started a suit against Charles P. Megan, Trustee, of the Chicago Northwestern Railway Company for damages that he alleged he had sustained when his automobile was struck by one of the defendant's trains, while the automobile was on the crossing of the defendant's tracks. It is alleged that the defendant Railway Company was negligent in the construction and maintenance of the crossing where the accident occurred. The case was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at \$512.00. At the conclusion of the plaintiff's evidence, and all of the evidence, the defendant entered a motion for a directed verdict. The court reserved his rulings on each of these motions, pending

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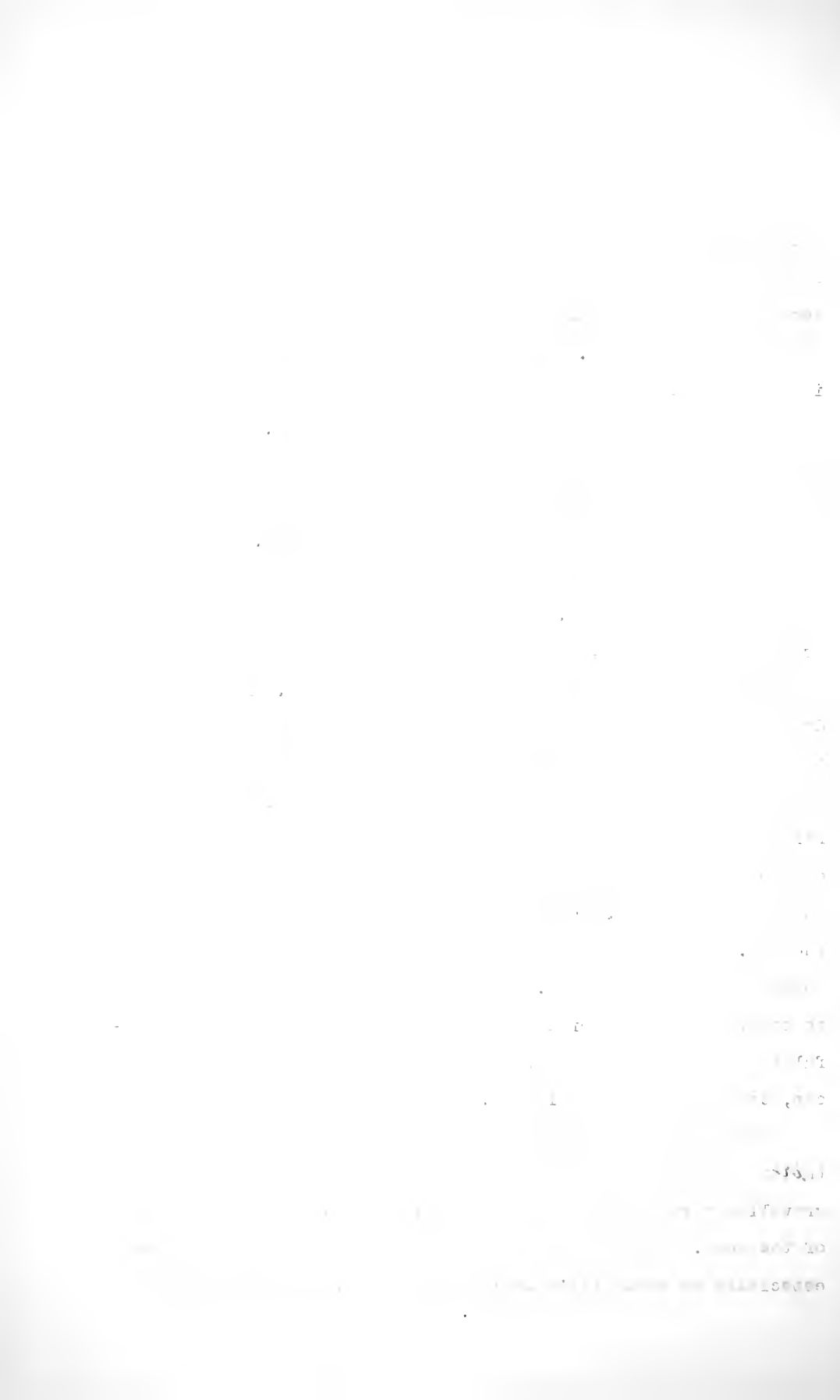
evidence, the defendant . . . . .

The court reserved its rights . . . . .

the verdict of the jury, and after the verdict of the jury, the court granted the defendant's motion for a directed verdict, entered judgment in favor of the defendant, and assessed the costs against the plaintiff. It is from this judgment that this appeal is prosecuted.

There is no dispute concerning the evidence. The appellant was driving his car on a gravel road, which runs in a northeasterly and southwesterly direction and crosses the defendant's railroad track, which runs approximately east and west. As the gravel road approaches the railroad, there is a slight rise on each side of the tracks. The night of the accident was <sup>a</sup>very stormy, snowy night. The plaintiff's windshield wiper on his automobile was frozen or stuck to the windshield. In order to drive his car, he had to get out every few hundred feet and wipe the snow off of his windshield. There was considerable snow on the ground. As plaintiff attempted to cross the tracks of the railway company, his car went too far to the right and got off of the planking and between the tracks of the railway company, and a wheel became stuck in some manner so they could not move the car. Shortly after this, the parties in plaintiff's car heard a train approaching. They attempted to signal the train to stop, but because of the storm and snow, they were unsuccessful in doing so, and the train came on, and struck the plaintiff's car, completely demolishing it.

The planking between the tracks at the crossing, is over ~~thirty~~ twenty-two feet in length, and is considerably wider than the gravelled part of the road, especially the main travelled part of the road. This is clearly indicated from the evidence, and especially by plaintiff's Exhibits 1, and 2, and defendant's



Exhibits C, D, and F. Defendant's Exhibit D clearly shows the rise in the road, as it approaches defendant's tracks and C, especially shows that the planking between the tracks on the right of way of the defendant, is much wider than the travelled part of the road. After considering the evidence and exhibits in this case, it is our conclusion that the plaintiff failed to prove any negligence against the trustee of the railway company, in the maintenance of this ~~crossing~~. The judgment of the trial court should be and is hereby affirmed.

Affirmed.

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STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
 in the year of our Lord one thousand nine hundred and  
 thirty-nine, within and for the Second District of the  
 State of Illinois:

303 I.A. 229

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On 1939 10 3  
 the Opinion of the Court was filed in the Clerk's Office of  
 said Court, in the words and figures following, viz:



Gen. No. 9501

Fig. No. 37.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
OCTOBER TERM, A.D. 1939.

ALICE ORME SMITH, et al.,  
Plaintiffs-Appellees. )  
vs. )  
VILLAGE OF VILLA PARK,  
Defendant-Appellant. )

Appeal from  
Circuit Court,  
DuPage County.

WOLFE, P. J.

One hundred eighty-four persons claiming to be the owners of certain special assessment bonds issued by the Village of Villa Park, started suit against the Village of Villa Park, on bonds that were alleged to be past due and unpaid. The declaration alleged that the Village of Villa Park had collected large sums on these special assessments, which had not been paid to the bondholders, either in principal or past due interest.

The defendant, Villa Park, filed its answer, in which it admitted that the bonds had been properly issued under the Local Improvement Act, but denied that the County Treasure, or anyone else had aid to the village Treasure, all of the money collected on special assessments involved in the suit, and denied that any money that the Village had received on these special assessment projects had been diverted for any purpose, other than the payment of bonds payable out of such fund.

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the following information:

The above information was obtained from the files of the FBI, New York City Office, dated 10/10/68.

Sincerely,  
J. Edgar Hoover  
Director

10-11-68

10-11-68

on special

projects had been diverted for money that the Village of

ment of bonds payable on 12/31

The case was referred to a special Master to take the evidence and report his finding and conclusions, both of fact and law. After taking the evidence, the Master found the issues in favor of the plaintiffs and recommended that a decree be entered in their favor in the sum of \$289,650.56. The defendants filed twenty-three objections to the Master's Report, which were overruled by the Master. These objections were allowed to stand as exceptions to the Master's Report in the trial court, and after a hearing on the same, the court overruled all of the exceptions and entered a decree in conformity with the recommendation of the special Master. It is from this decree, that the appeal is prosecuted to this court.

The appellee, on September 23, 1939, filed a motion in this court, to dismiss the appeal, because the abstract neither shows the necessary steps in the litigation, nor compliance with all of the essential requirements, as to appeal, and appellee further states numerous omissions in the abstract in regard to showing the notice of appeal, proof of such notice, etc. The appellee filed suggestions in support of their motion, and the appellant filed counter suggestions in opposition to the motion. This motion was taken with the case. We do not deem it necessary to pass upon that part of the motion, which relates to the abstract, failing to show the date of notice of appeal, notice, etc., since the abstract is wholly insufficient in that it fails to abstract the evidence.

Rule 38, of the Rules of Practice and Procedure Adopted by the Supreme Court, and also adopted as the rules governing this court, provides as follows: "In all cases, the party prosecuting an appeal in the Supreme or Appellate Court shall furnish





a complete abstract of the record, referring to the pages of the record by numerals on the margin. Where the record contains the evidence it shall be condensed in narrative form in the abstract so as to present clearly and concisely its substance. The abstract shall be preceded by a complete index, alphabetically arranged, indicating the nature of each exhibit and the page where it may be found, and giving the names of the witnesses and the pages of the direct, cross and re-direct examination.\* The abstract must be sufficient to present fully every error relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions."

An examination of the record in this case discloses that two parts of the record contain 872 pages and the other No. 3, the audit, contained 241 pages, which is continued in a separate volume. The abstract filed by the appellant, including the title of the case, is condensed in less than 16 full pages and is wholly insufficient to present the questions appellant relies upon for reversal. An examination of this purported abstract discloses that twenty-three objections were filed to the Master's report, which later were permitted to stand as exceptions in the Circuit Court. Fifteen of these are based on the insufficiency of the evidence, or the Master's misconception of the evidence. A further examination of the purported abstract discloses that the evidence of Marion G. Noble is condensed in four lines and the record itself shows that there are sixty-two pages of testimony of this witness. The same thing appears of the testimony of Hamilton T. Ross. His evidence is abstracted in four



lines and the record shows his testimony as covering many pages. The last 256 pages of the record are condensed in less than seven printed lines. There is no attempt whatsoever to abstract the audit, which is contained in Volume 3 of the record. Our Supreme and Appellate Courts, in a long line of decisions, have held that where the abstract does not show the evidence or points relied upon for reversal, a Court of Review will not search the record to ascertain the evidence, in order to find a reason for reversing the judgment. The following cases are in point: Kelley vs. People's National Fire Insurance Co., 262 Ill. 158; Frank vs. Central Mutual Insurance Company, 273 App. 446; Matot vs. Barnheisel 212 App. 489; Wood vs. Cosmopolitan Insurance Company 266 Ill. App. 556; Dreider vs. Sterling National Bank 280 Ill. App. 360.

For the failure of the appellant to file a sufficient abstract the appeal of the Village of Villa Park is hereby dismissed.

Dismissed.

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STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and  
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby  
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,  
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said  
Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand nine  
hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



40719

LAWRENCE E. HILL,

Appellee,

vs.

A. A. SPRAGUE, as Receiver  
for Chicago North Shore and  
Milwaukee Railroad Co., a  
corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

303 I.A. 229<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, a passenger on the train of defendant, on October 31, 1936, while alighting at State-Dearborn station on the Loop in Chicago, was thrown to the station platform and injured. He sued charging negligence of defendant in failing to keep a proper lookout, in causing the train to suddenly start while he was in the act of alighting and in failing to allow sufficient time to alight.

There was trial by jury and motion by defendant at the close of the evidence for an instructed verdict, with ruling reserved; a verdict for plaintiff with damages assessed at \$8,000; motions for a new trial and for judgment notwithstanding overruled; and judgment on the verdict from which defendant appeals.

It is urged for reversal alleged error in denying defendant's motions for an instruction in its favor, for a new trial and for judgment non obstante. It is also argued the court erred in the instructions given and refused.

As to the motions for a directed verdict and for judgment non obstante, the rule is that if there is evidence from which, considered in the light most favorable to plaintiff, the jury could reasonably in the eye of the law return a verdict in plaintiff's favor, then such motions should be denied. Provenzano v. Illinois Central R. R. Co., 357 Ill. 192; Boyd Dairy Company v. Continental Casualty Co., 299 Ill. App. 469, 471.

Defendant suggests negligence now claimed was not alleged in the complaint and cites authorities decided before the enactment

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A. R. Co., 327 Ill. App. 471.  
Central R. R. Co., 327 Ill. App. 471.  
Illinois v. Continental  
Company, 327 Ill. App. 471.

Mr. J. H. ...

Continental R. R. Co., 327 Ill. App. 471.

Illinois v. Continental

Company, 327 Ill. App. 471.

Continental R. R. Co., 327 Ill. App. 471.

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Illinois v. Continental

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Continental R. R. Co., 327 Ill. App. 471.

Defendant suggests negligence now claimed was not alleged  
in the complaint and other authorities decided before the enactment



of the Civil Practice Act. We hold the complaint reasonably informed defendant of the nature of the claim it was called upon to meet. (Smith-Hurd Anno. Stats., chap. 110, sec. 42, par. 166, p. 256.) Moreover, as hereafter stated this evidence was admissible on the issue of contributory negligence.

Plaintiff argues that the testimony of defendant's witness shows the trainman was negligent in giving the signal for the train to move when plaintiff was in the act of alighting. Defendant contends the testimony of plaintiff's witnesses shows plaintiff failed to exercise due care and that defendant was without negligence. The principal occurrence witnesses were the plaintiff, his friend Mr. Wise, Kruse, the trainman, and Madke, motorman of defendant.

The evidence tends to show plaintiff lived in Waukegan, Illinois, and was an oral surgeon, practicing in Chicago, with offices at 30 N. Michigan avenue. Plaintiff had been accustomed to use defendant's train each day for seven years prior to this occurrence. On the morning of October 31, 1936, at about 8 o'clock, he boarded defendant's southbound train at Waukegan. The train reached the State-Dearborn station about an hour later. This station is the last on the south side of the Loop and the first station east of LaSalle. Plaintiff testified that while the train was standing at the LaSalle station, he got up from his seat, put on his hat and overcoat, then sat down and waited for the train to approach the next station. He was sitting in the smoking compartment of coach No. 4 and in the rear part of the coach. As the train entered the State-Dearborn station he went forward toward the front door. When about the middle of the coach he noticed no passengers were waiting to get off. Plaintiff went on to the front door. It was closed. He opened it, stepped from the platform of the coach to the station platform which was some 4 to 6 inches lower than the coach platform. As he was in the act of stepping from one platform to the other the train was put in motion and plaintiff was thrown to the station plat-

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form. The train went on without stopping. Plaintiff was helped to his feet by Mr. Wise, who also was a passenger from Waukegan. A moment before Wise had alighted from the rear of coach No. 3. Plaintiff waited as usual until a local train came which carried him to the Madison-Wabash station, north and near his office.

The witness testified it was usual in the operation of defendant's cars for one trainman to take care of two entrances in adjoining coaches, the front door of one coach and the rear door of the other. Plaintiff and Wise testified that when defendant's train stopped at a station it was usual for a trainman to open the door of one of the coaches for passengers, and if the door of the other coach was not then open, passengers would sometimes open it. The guard or trainman passed back and forth and assisted passengers to get off the train with their baggage. This was a through train from Milwaukee. There were no signs or notices posted telling passengers not to open the doors. When a stop was made and after the passengers were unloaded the trainman would usually get out on the station platform and wait for a signal for the train to proceed. This signal was passed from the rear trainman to the trainman in front of him and so on up to the motorman. Occasionally bells with which the train was equipped were used. Mr. Kruse, the trainman in charge of the two coaches in which plaintiff and Wise rode, for a time sat in the seat with plaintiff. They knew each other quite well. Plaintiff says about midway of the car, while walking toward the front door, he heard a door slam. Whether it was the front or rear door he could not say. He kept going. He found the door closed. He could not see this door from his seat in the smoker. Plaintiff said he was familiar with the manner in which the trainman standing on the platform gave the signal "to go" to the motorman. When plaintiff came to the closed door he pulled it open enough to get by. Whether the door was completely open he did not know. He says: "As I remember it I opened it and kept my hand resting on the door. I opened it with my right hand. I pulled the door open

[illegible]

so I could pass through. As I passed through the door I had my hand on it with the idea of closing the door as soon as I stepped out. I did not have one foot on the station platform. I had one foot on the vestibule of the car; the other foot was in the air when the train started. One foot was on the platform of the car and the other foot was raised for the purpose of putting it on the station platform. At the same time I was pulling the door closed after me. That is when the train started. Then I fell out on the platform. The train started with a jerk and it threw me to the platform. This start was no more unusual than any other train. Then the train proceeded right along. From the time I got up out of my seat and until I stepped on the station platform, I didn't see any trainman at all on the station platform or in that car ahead of me."

Wise, who rode in coach No. 3 just ahead of No. 4, got off at the State-Dearborn station, alighting from the rear end. Wise says between LaSalle and the State-Dearborn stations he got up preparatory to alighting. When he arrived at the rear platform of the coach the exit door leading from the coach to the station platform was not opened. The trainman opened it. The train stopped. The witness got off, turned west to look for the local, the trainman meantime standing beside the coach. Wise saw Dr. Hill start out of the coach behind the one in which he (the witness) had been riding. The train lurched. Dr. Hill fell at the feet of Wise. Wise says when Dr. Hill started to get out of the train it was standing still. He did not observe whether any passengers were getting out of the coach in which he rode, and did not know whether the door of the coach was open when he (the witness) stepped out on to the platform. He did not observe whether any other passengers got out of the coach in which Dr. Hill was riding. The witness was standing 4 or 5 feet from the entrance out of which Dr. Hill came. He did not know how long it was after the trainman stepped into the coach that Hill stepped out. He did not see the trainman signal the motorman to

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start the train. He thought it started about 20 seconds after he (the witness) stepped out on the platform.

Kruse testified he was in charge of the doors at the rear of the third and the front end of the fourth coach. As the train left LaSalle station he rode in the third car. When the train started up at LaSalle he stepped back into the fourth car, called out the next station, then stepped into the third coach and likewise called. When the train stopped at State-Dearborn he first opened the rear door of the third car, then stepped back to open the door at the front end of the fourth car. (He did not say whether he, in fact, opened it.) He says when he stepped back (meaning on the station platform) he took a position between the two cars on the platform. The other trainmen were out on the station platform at about that time. He "believes" there was one passenger got off the front end of the fourth car. After this passenger alighted, Kruse says he looked down the aisle of the fourth car to see if more passengers were coming. One foot was on the platform of the car, the other on the "L" station platform. When he looked he did not see anyone approaching. He then closed the front door of the fourth car, and after closing it continued to discharge passengers from the third car. When that was done he passed up the signal to the conductor after receiving it from the rear man, stepped in the third car and closed the door. He passed the signal by raising his right hand over his head, then stepped in his car and closed the door. The train started practically immediately. Kruse says he did not know Dr. Hill was getting out of the front end of the fourth car. Radke, motorman, testified that the signal to proceed was given by holding the hand out from the shoulder and slightly above it.

The defendant argues the undisputed evidence shows plaintiff was negligent and defendant not. Plaintiff argues the undisputed proof showed defendant was negligent and plaintiff in the exercise of due care. One of the counts charged defendant with

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failing to keep a proper lookout. Kruse testified he looked into the aisle of the fourth car but did not see any passenger coming toward the exit. If plaintiff's testimony is true, and if Kruse in fact looked, he would have seen plaintiff. Kruse testified he did not see plaintiff coming from the door to the platform of the coach. Kruse could have seen him if he had looked. Plaintiff testifies and is corroborated by Wise that he came through the door to the platform of the coach before the train started. If this is true, then Kruse, the trainman, if he had looked would have seen the plaintiff. The questions as to negligence and contributory negligence did not so much depend either upon what plaintiff knew or what Kruse, the trainman, knew, but rather what in the exercise of that degree of care which the law imposed on each he in fact ought to have known. These were questions for the jury. The lookout, the sudden starting, the time allowed for alighting, all were questions of fact for the jury. The jury has returned a verdict which the trial judge, who also saw and heard the witnesses testify, has approved. We cannot say there is no evidence tending to prove the plaintiff's case.

In Lundquist v. Chicago Rys. Co., 305 Ill. 106, 110, the Supreme court said:

"The car or train was in control of the conductor, and he was required to know if by the exercise of due care, caution and diligence in the discharge of his duties he could know, whether any person was attempting to get on or off his train or car before permitting the same to start in such manner as would be liable or likely to injure a person so getting on or off the same."

In Jurkiewicz v. Illinois Central R. Co., 145 Ill. App. 44, 50, the court said:

"A carrier of passengers may not relieve itself from liability in cases like this, by proving that its trainmen did not know passengers were alighting."

In Lyman v. Chicago City R. Co., 176 Ill. App. 27, 33, the court approved this statement of the law. Other cases to the same effect are Chicago City Ry. Co. v. Grauf, 235 Ill. 262, 264;



B. & O. S. W. R. R. Co. v. Mullen, 217 Ill. 203, 207; Chicago Terminal R. R. Co. v. Schmelling, 197 Ill. 619, 629; North Chicago St. R. R. Co. v. Brown, 178 Ill. 187, 190; Chicago & Alton R. R. Company v. Arnol, 144 Ill. 261, 269; McNulta v. Snach, 134 Ill. 46.

The defendant contends that the verdict of the jury is against the weight of the evidence and that a new trial should have been granted for that reason. The defendant says the evidence shows nothing out of the ordinary occurred except what plaintiff did; that it is clear plaintiff knew the door of the coach had been opened; that other passengers had alighted; that the door had been closed; that the proceed signal had been given; that plaintiff also knew the trainman did not know that he was in the act of alighting. The evidence does not justify these statements. The law imposed on trainmen in charge of passengers a degree of care commensurate with the risk to the passengers, and this is a higher degree of care than passengers themselves are required to use for their own safety. We assume the trainman did not intentionally start the train for the purpose of throwing plaintiff off. We also assume plaintiff did not intentionally put himself in a position where he would be thrown. As already said, the question is not what either knew but rather what, considering the respective duties of each in exercise of care required under rules of law, each should have known. These questions were for the jury.

The defendant complains that the court admitted evidence as to the practice of defendant in permitting passengers to open doors of the car. It is said this evidence was highly prejudicial and had no tendency to prove any issue in the case. Defendant cites Urban v. Pere Marquette R. Co., 266 Ill. App. 152. In that case the plaintiff's intestate was struck by defendant's train while he was crossing a street. Plaintiff offered evidence tending to show the gates of defendant were up when the deceased started across. The declaration did not charge negligence in respect to the maintenance

U.S. v. [illegible]

Terminal [illegible]

U.S. v. [illegible]

Gonzalez v. [illegible]

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of the crossing, and defendant objected on that ground. The evidence was admitted and the defendant asked an instruction to the effect this evidence should be disregarded except in determining whether plaintiff's intestate was guilty of contributory negligence. The instruction was refused. This was argued as error. The real question in that case upon appeal was not concerning the admission of the evidence but its limitation to the issues. We held it error to refuse the instruction, but that the evidence was admissible on the issue of contributory negligence. It was also admissible here on the same issue. A few of the cases holding evidence of usual practice or custom admissible are Courley v. Chicago & E. I. Ry. Co., 295 Ill. App. 160, 176; Chicago & St. P. Ry. Co. v. Carpenter, 56 Fed. 451; Pennsylvania Company v. McCaffrey, 173 Ill. 169, 173; North Chicago St. R. R. Co. v. Kaspers, 186 Ill. 246, 249; Chicago City Ry. Co. v. Lowitz, 218 Ill. 24, 27; North Chicago St. R. R. Co. v. Irvin, 202 Ill. 345, 347; Hill v. Richardson, 281 Ill. App. 75, 77; Fowler v. Chicago Railways Co., 285 Ill. 196, 201; Campbell v. C. R. I. & P. Ry. Co., 243 Ill. 620, 624; Franey v. Union Stock Yards Co., 235 Ill. 522, 528; C. & W. I. R. R. Co. v. Doan, 195 Ill. 168, 171.

Defendant next contends that the court erred in the giving and refusing of instructions. Complaint is made that the court instructed the jury in substance that it was the duty of a common carrier of passengers to exercise the highest degree of care and caution for the safety of passengers in alighting from and boarding cars and to do all that human foresight and diligence could reasonably do consistent with the mode of conveyance and practical operation of the conveyance to prevent accident to passengers, and in another instruction told the jury that a defendant in such a case was responsible for the slightest negligence resulting in injury to its passengers if the passenger at the time of the injury was exercising ordinary care for his own safety. Defendant complains that these



instructions were in abstract form disregarding specific facts, and again in effect reargues that an instruction in favor of defendant should have been given. Similar instructions were approved by this court in Arndt v. Riverview Park Co., 259 Ill. App. 210, 219, Sezuck v. Chicago Railways Co., 229 Ill. App. 325, 334. These are stock instructions that have been repeatedly approved by the courts of this state. Defendant says that the plain effect of the last instruction as given was to make defendant's liability depend solely upon whether plaintiff was in the exercise of ordinary care and in effect relieving plaintiff of the burden of proving the negligence charged. The instruction is not subject to this criticism. It did not direct a verdict. Instructions are to be considered as a series, and the jury in this case were fully instructed on every phase of it. Sixteen of nineteen instructions requested by defendant were given by the court.

Defendant cites Heineke v. Chicago Rys. Co., 279 Ill. 210; Davis v. South Side El. R. R. Co., 292 Ill. 378 (erroneously cited in the brief as 293 Ill. 278) and Dean v. Yelloway Pioneer System, 259 Ill. App. 180. The Heineke case had to do with a situation where a passenger left a suitcase in the aisle of the car over which plaintiff (a passenger) fell. The court, while affirming the judgment for plaintiff, stated that ordinarily the railroad would not be held liable on account of what another passenger did. The other cases relied on have to do with the degree of care required of a common carrier with reference to its stations and approaches thereto. The rule there requires only ordinary care and is entirely different from that required in the case of alighting passengers. Defendant cites Beltz v. Buffalo R. & P. Co., 119 N.E. (N.Y.) 81, where a passenger while alighting slipped on a box especially provided by the trainman to lessen the distance from the steps of the car to the station platform. It is not applicable here. Defendant also cites Raymond v. Portland R. Co., 62 Atl. (Me.) 602, a case





decided by the Supreme court of Maine in which that court concluded the jurists from Rome onward have improperly attempted to define and distinguish the degree of care required in particular situations and relationships. We are obliged to follow the decisions of the courts of our own state.

The defendant again complains that the court in instructing with reference to contributory negligence told the jury that plaintiff was obliged to use ordinary care and says that these instructions applied entirely different rules as to the degree of care required by plaintiff and that required of defendant. This is the correct rule, declared by the courts of this state so often that we think it unnecessary to cite authorities.

Complaint is also made that the court refused an instruction requested by defendant to the effect that the allegation of ordinary care in the complaint was a material allegation "and one which the plaintiff must affirmatively prove by the preponderance or greater weight of the evidence in order to recover". We think other instructions fairly informed the jury as to the law on this point. Moreover, the instruction as requested is, we think, subject to criticism in that it was so phrased as to single out a particular issue and require plaintiff to "affirmatively prove" this allegation. The phrase is often used in opinions of the courts but in an instruction might well confuse a jury in causing it to think only positive and direct as distinguished from inferential and circumstantial evidence could be considered in deciding this issue.

Noonan v. Maus, 197 Ill. App. 103; Gates v. Hughes, 44 Wis. 332 at 337. We hold there was no error in refusing the instruction.

It is contended in the next place the damages allowed are excessive. The evidence shows defendant suffered a fracture of the radius of the left wrist. He was a doctor practicing oral surgery which included the extraction of teeth, treatment of fractured jaws, operations on the tongue and by treatment of any part of the human body between the front lips and the throat; speaking generally, per-

decided by the jury. The jury found that the defendant distinguished the defendant's relationship with the defendant of our own state.

With respect to the defendant's relationship with the defendant, the jury found that the defendant distinguished the defendant's relationship with the defendant of our own state. The jury found that the defendant distinguished the defendant's relationship with the defendant of our own state.

The jury found that the defendant distinguished the defendant's relationship with the defendant of our own state. The jury found that the defendant distinguished the defendant's relationship with the defendant of our own state. The jury found that the defendant distinguished the defendant's relationship with the defendant of our own state.

Noonan v. Noonan, 100 Cal. 100, 101. 337. We hold that the defendant distinguished the defendant's relationship with the defendant of our own state.

It is contended in the defendant's brief that the evidence shows defendant's relationship with the defendant of our own state. The evidence shows defendant's relationship with the defendant of our own state. The evidence shows defendant's relationship with the defendant of our own state.

forming operations upon anything within the mouth. He has since the accident performed all operations of the kind theretofore performed by him. The removal of teeth, he explains, is a wrist action. He says in performing these operations he still has a feeling of stiffness in his wrist. At the end of a long day or of a long operation he has pain. A deft use of the fingers is indispensable to the best work on the part of such an operator, and it is important that he be able to use the fingers of both hands. For little over two years before he began practicing in Chicago, plaintiff prepared specially to do this work at the Mayo Clinic at Rochester, Minnesota. He is a partner of Dr. Thomas. Most of the work the partners do is referred to them by other practitioners. The injury to plaintiff's wrist had a tendency to damage his reputation professionally. Plaintiff's bill for medical attention was \$200; for X-rays, \$75. The accident happened on Saturday. He came to his office on Monday. He lost perhaps no more than six days from his office work, but he was not able to perform any of his regular duties for two months after the accident. He did not resume performance of simple extractions for thirteen weeks thereafter. The evidence shows a permanent injury in that there is a slight limitation of the motion in the left wrist. Plaintiff is righthanded. The principal damage to plaintiff has been an injury in respect to special talents in his profession by which he earns his livelihood. There is, however, no evidence showing the precise amount of financial loss. Prior to the accident he was accustomed to earn \$1250 per month, and his office expenses were from \$300 to \$400 per month. The assessment of damages is peculiarly a matter for the jury. The damages seem large but after all we cannot say they are so excessive as to require a reversal. The judgment will be affirmed.

AFFIRMED.

McSurely, J., concurs.

Mr. Justice O'Connor dissenting:

I am unable to agree with the conclusion reached. I agree

SECRET

Mr. Justice O'Connor dissenting:

I am unable to agree with the conclusion reached. I agree

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that the question whether the trainman exercised the degree of care the law required was for the jury, but I am also of opinion that all the evidence shows plaintiff was guilty of contributory negligence. He knew that the train had stopped to discharge passengers; that there was no one in the aisle ahead of him as he proceeded toward the door of the car, and the uncontradicted evidence is that after the car stopped the door was opened and possibly one passenger alighted from the car. The door was then closed. Plaintiff knew, or, in the exercise of due care, should have known, all of these facts.



40726

WILLIAM N. BRADY,

Appellant,

vs.

THE FIDELITY & CASUALTY  
COMPANY OF NEW YORK, a  
corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

303 I.A. 230

MR. PRESIDENT JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts out of which this appeal arises are as follows:

In an action in chancery in the nature of an interpleader in the Circuit court of Berrien County, Michigan, a decree was entered directing the funds deposited by certain insurance companies, to the amount of \$16,197.85, be paid to William N. Brady (plaintiff here), forthwith. H. R. Botkin, receiver and claimant of the fund, filed a claim of appeal in the Supreme court of Michigan. He filed no bond in the trial court, and the appeal, therefore, did not operate as a supersedeas. February 20, 1934, Botkin petitioned the Supreme court of Michigan the decree might be amended or, in the alternative, payment to Brady be stayed upon Botkin giving a bond. The Supreme court granted the stay upon the filing within ten days of a bond in the sum of \$1000, conditioned that appellant would pay all damages sustained by Brady in case the decree was affirmed. On January 3, 1935, the decree was affirmed (Brady v. Botkin, 269 Mich. 642), with costs to be assessed against Botkin. These costs were so assessed. \$14.81 for court costs, including briefs, etc., and \$50.00 for attorney fees. On February 2, 1935, this sum of \$64.81 was paid by Botkin to R. E. Barr, attorney of record in that case for Brady. On the same day Barr executed and filed in the Michigan court a satisfaction in writing which stated that the sum of \$64.81 was received from Botkin "in full payment, satisfaction and discharge of the liability of the defendant on the stay bond given pursuant to the order of the Supreme court, and accordingly said bond is hereby discharged

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from Botkin "in full payment, satisfaction and discharge of the lia-  
faction in writing which stated that the sum of \$14.81 was received  
the same day Bart executed and filed in the Michigan Court a notice  
Botkin to R. E. Bart, attorney of record for the defendant, on  
attorney fees. On February 2, 1935, the sum of \$14.81 was paid by  
\$14.81 for court costs, including trial, and  
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maintained on stay in the Michigan Court. The sum of \$14.81 was  
the sum of \$14.81 was paid by the defendant to the court.  
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and released".

December 31, 1936, nearly two years thereafter, plaintiff filed this suit in the Superior court of Cook county. The complaint declares on the bond and claims \$704.16, a sum equal to the interest on \$16,197.85, at the statutory rate (5% in both Michigan and Illinois) from February 20, 1934, to January 3, 1936. Defendant filed its motion to strike the complaint, attaching to the motion a certified copy of the release and satisfaction filed in the Michigan Supreme court. Plaintiff made a motion for summary judgment supported by his affidavit. He also filed an affidavit in opposition to the motion of defendant to strike the complaint. The procedure as to the motion for summary judgment was under section 57 of the Civil Practice Act and Rules of the Supreme court of Illinois. (Smith-Hurd Anno. Stats., chap. 110, par. 181, p. 485; Supreme Court Rule 15, par. 259.15, p. 523.) The motion to strike was pursuant to section 45 of the same act. (Smith-Hurd Anno. Stats., chap. 110, par. 169, p. 287.) The motion for summary judgment was denied; the motion to strike was allowed; the suit was dismissed, and plaintiff appeals.

Defendant argues the claim of plaintiff was adjudicated against plaintiff by the judgment for costs and assessment of the same in the Supreme court of Michigan; that plaintiff is bound by the satisfaction and release filed by his attorney, Barr, in the Supreme court of Michigan, and that at any rate the damage for which plaintiff sues is not within the terms of the bond upon which the action is based. The motion to strike set up the Statute of Limitations of Michigan and Illinois, but this defense cannot be allowed on any theory. (Metropolitan Trust Co. v. Bowman Dairy Co., 369 Ill. 222.) The point is not argued in defendant's brief and will be regarded as waived.

The supposed cause of action arose in the State of Michigan, and the substantive rights of the parties are to be determined by the laws and statutes of that state. Plaintiff cites authorities to the

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The suggested names of persons known to the State of Illinois and the representative rights of the persons known to be determined by the laws and statutes of that State. Relatively other authorities to the

proposition that the measure of damages for the wrongful deprivation of the use of money is a sum equal to statutory interest. Defendant does not dispute this rule but claims such damage is not covered by the bond. Defendant also contends all questions of liability upon the bond were determined by the Supreme court of Michigan; that the Michigan judgment assessing damages is res adjudicata and the parties here concluded thereby. Defendant cites section 14510 of the Michigan statutes (see Compiled Laws of Michigan, 1929) which provides in substance that in all cases where judgments shall be rendered against the appellant in the Circuit or Supreme courts, the same may, on motion of the appellee made in apt time, be entered against both the appellant and the surety and be collected on execution against them as in ordinary cases of judgment against two or more. It has been held in well considered cases that the doctrine of res adjudicata extends not only to questions actually decided but to all matters which might have been raised or determined as to grounds of recovery, etc., and defenses which the parties might have presented whether they did or did not present them. (Godschalck v. Weber, 247 Ill. 269, 93 N. E. 241.) This seems to be the general rule. (Restatement, Conflict of Laws, sec. 450, par. 2, p. 533.) This rule seems to have been followed and applied in Michigan in appeal bond cases. (Kephart v. Farmers' & Mechanics' Bank, 4 Mich. 602; Kelly v. Gaukler, 164 Mich. 519, 129 N.W. 703; Miller v. Maher, 178 Mich. 571, 146 N.W. 196.)

Defendant contends that the bond sued on is an appeal bond and that its construction is controlled by provisions of the Michigan statute. (Compiled Laws of Michigan, 1929, Vol. 3, chap. 286, p. 5470, sec. 15511; Richardson v. Richardson, 82 Mich. 395, 46 N.W. 670.) Defendant says the statutory requirements of an appeal bond are that it shall be conditioned to pay to the appellee costs if the judgment is affirmed, and also for the performance of the decree from which



the appeal is taken. The last named requirement, however, does not obtain if the money involved in the litigation is (as it was in this case), held in the hands of the clerk of the court. Defendant, therefore, says that the word "damages" as it appears in the bond sued on should be construed to mean that Botkin would pay only the costs of appellee. Defendant argues any other construction would make the bond invalid. (Michie v. Ellair, 60 Mich. 73; Kunz v. Omaha Hotel Co., 107 U.S. 378, 395; Tomlin v. Green, 39 Ill. 225, 227.) In the last case the Supreme court of Illinois said that the bond having been taken as a condition of the right of appeal cannot go beyond the requirements of the statute, and further conditions are void.

Plaintiff replies that so far as this stay bond is concerned it was not executed pursuant to section 15511 of the Michigan statute and it is in no sense an appeal bond. It is not possible, plaintiff urges, that an express contract to pay damages should be construed as limited to the payment of costs, or, in the alternative, held void as requiring more than the statute specifies. This bond, plaintiff says, is not a statutory appeal bond at all. The statute of Michigan, he says, makes no provision for filing an appeal bond like this in the Supreme court on appeal. Section 15511, plaintiff says, relates solely to bonds filed in the trial court. Plaintiff states Botkin let his right to give bond in the trial court under the statute lapse. He says the power of the Supreme court under which it ordered the bond was pursuant to authority under the statute to make rules of court. (Compiled Laws of Michigan, 1929, sec. 13604; Michigan Statute Anno., Vol. 20, sec. 27111, p. 127; Rule 72, Searls Mich. Court Rules, pp. 431-32.) This rule provides that the Supreme court of Michigan has the power to require any bond on such terms as it may deem just. In Michigan, on appeals from chancery decrees the cause is heard de novo. (Robinson v. Robinson, 275 Mich.



420.) The petition of Botkin to the Supreme court asked the court to "fix and determine the amount and conditions" of the bond to be given and plaintiff earnestly contends the bond here sued on is not limited by any statutory provisions.

These arguments present questions under the law of the State of Michigan. We think answers not necessary to a decision of this case.

Plaintiff did not seek to have this claim adjudicated in the courts of Michigan. He had the right to choose. He seems to have preferred an Illinois jurisdiction where judges, less familiar with the practice of the State of Michigan, would pass upon his rights. We are not disposed to hold the Supreme court of Michigan was without power to require a bond free from the limitations of appeal statutes. However, the order for this bond seems to indicate it was intended to perform the functions of a statutory appeal bond. It was a stay bond. We are inclined to the view that the court had power under its rules to require a bond conditioned to pay interest on the fund. It could have done this. It did not. The condition is to pay "damages", and the question in construing the bond is, what damages? In the first place, we think damages limited to such as plaintiff Brady might sustain because of the stay. Brady would have to have an attorney who in the usual order of things would require compensation. If Botkin's appeal was not sustained it was entirely proper the compensation paid the attorney by Brady should be considered a part of Brady's damages. The attorney would have to print briefs for which Brady would have to pay. This item too would be a part of Brady's "damages." Plaintiff (denying that the doctrine of res adjudicata is applicable) says these costs could not have been assessed against the surety in the Michigan court. We hold he is mistaken. Section 14510 of the statute is plainly to the contrary. Plaintiff could have had his claim for damages adjudicated if he had presented it. He did not present it. It





follows the rule of res adjudicata is applicable and further suit barred by the Michigan judgment.

The action of plaintiff's Michigan attorney is persuasive. This construction we adopt was the construction he put upon the bond. It was he who successfully conducted the litigation in plaintiff's behalf in the Supreme court of Michigan. We hold he correctly construed the bond. Plaintiff, desiring to escape the effect of the release and satisfaction, filed an affidavit which must be construed most strongly against him. It is significant in its omissions. Most of it is mere conclusion without statement of actual fact. He says he did not authorize or ratify the execution of the satisfaction piece and that he did not know of the existence of it until this suit was filed. He does not tell us when he first came to know the amount of \$64.81 had been received by his attorney in full payment and satisfaction of the bond. He does not state what was done with the money received by his attorney or how or when applied. He does not deny the money was received for his use. He does not say the attorney was discharged or reprimanded for exceeding his authority. He gives no adequate explanation of the tardy discovery of his supposed rights. We hold, as a matter of law, the doctrine of res adjudicata is applicable, and, as a matter of fact and law, that defendant under the circumstances disclosed is bound by the release and satisfaction filed in the Supreme court of Michigan. If we regard the bond sued on as a common law obligation, we think in view of the contemporaneous construction put upon it by the parties, the term "damages" could not be held to cover interest or the equivalent of interest on the funds in the hands of the clerk. The decree itself did not draw interest. If it had been the intention defendant should be liable for this interest, we think the bond would have said so. Interest is not usually allowed in the absence of statute. Damages are allowed here and in Michigan for vexatious appeals without merit. The Supreme court of Michigan did not find the appeal



of Botkin was of that kind. The trial court did not err in striking the complaint and dismissing the suit. The judgment will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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know.

ROSE KIMEN,  
Appellant.

AMY B. ETTTELSON and LEONARD B. ETTTELSON,  
Executrix and Executor, respectively, of  
the Last Will and Testament of Samuel A.  
Etttelson, Deceased, and LEONARD B.  
ETTTELSON,  
Appellees.

CIRCUIT COURT,

COOK COUNTY.

30: 1.5, 230<sup>2</sup>

This is an appeal by plaintiff from a judgment, which sustaining the motion of defendants to strike her second amended and supplemental complaint, dismissed plaintiff's suit with judgment. The defendants, Samuel A. Ettelson and Leonard B. Ettelson, were attorneys at law practicing in Chicago. The complaint alleges they were employed by plaintiff on October 31, 1934, to present in her behalf to the Supreme court of the United States a petition for a writ of certiorari to the Second Division of this court to secure the review and reversal of its judgment in the case of Kimen v. Atlas Exchange National Bank, 275 Ill. App. 638. In the trial court plaintiff sued the bank on its written agreement of November 2, 1929, wherein it agreed to repurchase at par and accrued interest \$4,000 First National Company collateral trust, first mortgage bonds, sold by defendant bank to plaintiff on that date. This judgment was reversed by the Second Division of this court, following its opinion in an analogous case filed on the same date. Awotin v. Atlas Exchange National Bank of Chicago, 275 Ill. App. 530. The reversal in the Appellate court was for the reason that it appeared defendant was a National Bank and the contract to repurchase was invalid, illegal and ultra vires under Paragraph 7 of Section 5136 of the United States Revised Statutes as amended February 25, 1927. United States Statutes at Large, 1925-1927, Vol. 44, Part 2, Public Laws, pp. 1226-1227. The Supreme court of Illinois denied leave to appeal

AMY M. RILEY, et al.  
Respondents

vs.

UNITED STATES REVISOR  
The court in this case  
was divided 5-4.  
The dissenting opinion  
was written by Justice  
Brandeis.

Chief of National Bank

and Trust Company

Chicago, Illinois

Plaintiff

vs.

First National Bank

of Chicago, Illinois

Defendant

in an analogous case

Chicago National Bank of Chicago

in the Appellate court was for the reason that it was

was a National Bank and the contract to repurchase

illegal and ultra vires under paragraph 7 of section 110 of the

United States Revised Statutes as amended February 28, 1937. United

States Statutes at Large, 1935-1937, Vol. 44, Part 2, Public Laws,

pp. 1226-1227. The Supreme court of Illinois denied leave to appeal

from the judgment of the Appellate court. Certiorari was allowed by the United States Supreme court in both the Awotin and Kimen cases, and on April 29, 1935, that court, likewise following its own opinion rendered on the same date in the Awotin case, 295 U.S. 209, affirmed the judgment of the Second Division of this court. Kimen v. Atlas Exchange National Bank of Chicago, 295 U.S. 215.

The complaint avers the trial court found, and the record in the Kimen case showed, that the bonds purchased by plaintiff from the bank were at the time of purchase the property and assets of the bank, and that in selling these to plaintiff the bank was not conducting the business of "buying and selling investment securities" and was not acting in the capacity of a broker as defined by this Section 5136. The complaint further avers that Samuel A. Ettelson represented to the plaintiff that the success or failure of her effort to get the judgment reversed would depend upon whether the bonds plaintiff purchased were actually the property and assets of the bank and held by it for investment when sold, or, whether the bank was acting as a mere broker in the sale thereof. He represented (the complaint says) that this fact would be presented to the Supreme court for the purpose of showing that Paragraph 7 as amended (prohibiting National Banks from doing business in securities, except without recourse), was not applicable. The complaint says Samuel A. Ettelson agreed and promised that in the brief and argument to be prepared and filed in the Supreme court of the United States, defendants would present to the court the difference between the sale by a National Bank of securities of its own in the course of its business as a bank, and the sale by it of securities owned by others in the capacity of a broker. The complaint says plaintiff relied upon these representations in contracting with defendants for their professional services and agreed to pay the sum of \$1500 to them before the briefs and arguments were prepared or filed. The complaint says that in breach of this agreement and also in breach of their implied agreement to conduct the proceedings in the Supreme court competently





and efficiently, defendants failed to include these matters in their brief and argument to the Supreme court; failed to present and argue the available court decisions, and on the contrary presented and argued other theories and propositions (what or which is not stated) on which the court held against the plaintiff, and that as a consequence of this failure to present her case as agreed the Supreme court considered the appeal upon other questions; did not and could not hold that the sale of the bonds in question by the bank to plaintiff did not fall within the prohibition of Paragraph 7 of Section 5136 as amended February 25, 1927. The complaint avers (and this appears to be the gist of it) that if defendants had argued and briefed the cause as agreed the decision of the Supreme court of the United States would have been in her favor, and she would have recovered the sum of \$4,000, purchase price of the bonds, with interest from November 2, 1929. The complaint avers this sum was lost for the failure of defendants to present her case as agreed, and plaintiff is therefore entitled to the return of the consideration amounting to \$1500, which she paid to defendants, as well as the \$4,000 with interest which she would have recovered if her cause had been presented to the Supreme court as agreed.

The contention of defendants that the material averments of the complaint are conclusions rather than statements of fact is plausible. The difficulty of determining when an averment in a pleading is one or the other has been well set forth in Crane v. Schaefer, 140 Ill. App. 647, in an opinion by Mr. Justice Brown, which is commended to bench and bar. The provisions of the Civil Practice act have materially changed the conceptions of pleading in this state. A plain and concise statement is all that is required, and objections to the sufficiency of pleadings not raised in the trial court are waived. (Smith-Hurd Anno. Stats., chap. 110, sec. 33, par. 157, p. 146, and sec. 42, par. 166, p. 256.)

The gist of plaintiff's complaint is found in the statement that arguments and authorities as agreed upon between the parties

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were not presented by defendant attorneys to the Supreme court, with the further averment that if these had been presented the decision of the court would have been otherwise. The cases are rare, indeed, in which a pleader can assert with certainty what the decision of a court "might have been." There are such cases, as, for instance, where an attorney fails to interpose the defense of the Statute of Limitations where the action has been barred thereby and similar cases. In this case the certainty appears to be that the court would<sup>not</sup> have adopted the argument if it had been presented. The language of the opinion of the Supreme court in Awotin v. Atlas Exchange National Bank, 295 U.S. 209, 211; 79 L. Ed. 1393, 1396, 1397, leaves practically no doubt about this, and if there ever was any doubt it has been removed by future decisions of the courts of federal and other jurisdictions. This court, as its records show, recognized the merits of the claims of the creditors based upon contracts to repurchase securities. Freedman v. Madison & Kedzie State Bank, 259 Ill. App. 519, in which certiorari was denied by the Supreme court, 259 Ill. App. xiv; Madison & Kedzie State Bank v. Dean, 263 Ill. App. 646; Awotin v. Atlas Exchange National Bank, 265 Ill. App. 238; Hoffman v. Sears Community State Bank, 269 Ill. App. 644; and Knass v. Madison & Kedzie State Bank, 269 Ill. App. 588, are cases in which were sustained claims of this class of creditors. These were overruled by the decision of the Supreme court of Illinois in Knass v. Madison & Kedzie State Bank, 354 Ill. 554, 188 N.E. 836, followed by Hoffman v. Sears Community State Bank, 356 Ill. 598, 191 N.E. 280, and subsequent cases. Federal and state decisions are to the same effect and show that the courts have been persuaded to disregard what seemed to us just demands of creditors by what they have conceived to be the public peril to banks and through banks to the whole community if contracts of this kind are legalized and enforced.

The reasons stated in the opinions in the Kimen and Awotin cases are as applicable to a case where the bank sells its own securities as where it contracts to sell the securities of others,

cases are as applicable to a case where the bank will file the 0-9

and decisions in both state and federal jurisdiction since show this to be true. It would be tedious to review in detail. Illustrative are Genessee Trust Corp. v. Smith, 102 Fed. (2d) 125; Awotin v. Healy, et al., and Kimen v. Healy et al., 92 Fed. (2d) 615. In the last named case it was held on a bill to enforce in equity a judgment based on a cause of action of this kind that the Federal court would go behind the judgment to inquire into the nature of the action, and finding it to be based on this sort of a contract would set it aside and refuse relief. It is worthy of note that petition for certiorari from this judgment was denied by the Supreme court of the United States in 303 U.S. 650.

The court of Appeals of New York in Rothschild v. Manufacturers Trust Co., 279 N.Y. 355, 18 N.E. (2d) 527, the courts of Michigan in Brown v. Union Bank Company, 274 Mich. 499, 265 N.W. 447, have consistently adhered to the law as stated in Kimen v. Atlas Exchange National Bank of Chicago, 295 U.S. 215, 216, 79 L. Ed. 1398, 1399, and Knass v. Madison Kedzie State Bank, 354, Ill. 554, 198 N.E. 936. In a note to the Rothschild case, 120 A.L.R. 485, the editor states the annotation supersedes that formerly given in 60 A.L.R. 818, and collects the cases which follow the Awotin, Kimen and Knass cases with almost unanimity. In many if not most of these cases the bank had sold and agreed to repurchase securities which were its own property. We are persuaded no skill or vigilance of a lawyer, however distinguished, could have procured a different decision in the Kimen case. The trial court correctly held the complaint did not state a cause of action, and the court did not err in striking the complaint and entering the order dismissing the suit. The judgment will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.



40738

PORTER D. WINANS, )  
Appellee, )

vs. )

BALTIMORE AND OHIO RAILROAD )  
COMPANY, a corporation, )  
Appellant. )

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

303 I.A. 231

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant asks for the reversal of a judgment against it of \$17,000 entered on the verdict of a jury in an action brought by plaintiff, a switchman or yardman of defendant, to recover damages on account of personal injuries sustained by him.

The action was brought under the Federal Employers' Liability Act, plaintiff alleging that defendant did not furnish him with a safe place to work, by reason of which he sustained the injuries in question.

The accident happened about eight o'clock of the evening of January 12, 1938, in the yards of defendant at Parkersburg, West Virginia; plaintiff was engaged in switching cars, and cutting off cars from the freight train where necessary; it had snowed quite a bit that day, although the snow was pretty well melted. Plaintiff testified he was stepping in towards the train to cut off two cars; he gave the engineer a signal to stop and stepped in to uncouple the cars when he tripped on a wire which pitched him under the train with his left hand on the rail; before he could get his hand off the rail it was run over and crushed; he took two steps away from the train and felt the wire on his foot; it seemed to be fastened and plaintiff jerked it loose; he was assisted to the scale house where he called the yardmaster's attention to the wire; plaintiff said he was too busy to see what the wire was fastened to; that it is a wire used to hold the stakes down on the platform of a car. Upon the trial he was shown a wire which he thought was the same wire, al-

PORTER D. MINNIS, Chicago, Illinois.

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COMPANY, a corporation,  
BALTIMORE AND THE BALTIMORE  
AP 11/19/48

AMOUNT OF THE INVESTMENT IN THE COMPANY

On 12/15/54, the Bureau of the Census reported that the total amount of the 1954-55 fiscal year's appropriation for the Bureau of the Census was \$17,000,000. The Bureau of the Census reported that the total amount of the 1954-55 fiscal year's appropriation for the Bureau of the Census was \$17,000,000. The Bureau of the Census reported that the total amount of the 1954-55 fiscal year's appropriation for the Bureau of the Census was \$17,000,000.

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though it was not in the same shape as when it stuck to his foot on the night of the accident. The wire was about five or six feet long and about one-eighth of an inch in diameter and was old and rusty looking. Unfortunately it was lost during the trial; it was offered and admitted in evidence and left in the trial judge's chambers, wrapped in a piece of paper; the janitress, not knowing its importance, threw it in a refuse can from which it was taken and never recovered.

The facts of the accident as described by plaintiff are not in dispute. In many cases under similar circumstances the plaintiffs' recoveries of damages have been sustained. In Doyle v. St. Louis M. B. T. Ry. Co., 326 Mo. 425, plaintiff tripped on a piece of wire on the ground and was thrown under a passing train; defendant was held guilty of negligence because of the presence of this wire on the right-of-way. Certiorari was denied by the Supreme court of the United States. 283 U.S. 820. In Barbee v. Davis, 187 N.C. 78, a switchman going along the railroad tracks stepped on a stick of wood which threw him and he was injured; his recovery was sustained. So in Bird v. St. Louis S. F. Ry. Co., 336 Mo. 316, an employee stumbled over some coal; it was held to be the duty of the employer to exercise ordinary care to furnish the employees a reasonably safe place to work. In Chicago R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, plaintiff was caught by a piece of wire, one end of which was attached to a freight car; the judgment against the railroad was sustained.

The principal defense is there was a failure of any evidence to show the wire had been at the place in question a sufficient length of time to enable defendant, in the exercise of ordinary care, to have removed it. Plaintiff argues there is sufficient evidence to justify the conclusion that the wire lay at the point where plaintiff was injured for such a length of time that a reasonable inspection would have discovered it. It was old, black and rusty; one end was imbedded in the ground; it had been snowing and probably one end of the



wire was frozen in the ground. There was testimony indicating that wires used for tying merchandise onto flat cars occasionally fell off onto the right-of-way, and defendant introduced evidence tending to show that the right-of-way was inspected by trainmen to discover such wires and other obstacles. The track foreman testified that materials or objects on flat cars dropped on the side of the road and that he had found wire along the track.

The crew charged with the duty of inspection had on the day of the accident and the previous day been sent up the main line about nine miles from the place of the accident; they testified that as they rode along on a motorcar going about ten miles an hour past the place in question they looked and did not see a wire or anything at this place. The jury could reasonably believe that the crew going along on the motorcar at ten miles an hour could not give adequate inspection. The fact is established without contradiction that the wire with which plaintiff became entangled was as he described, and if the inspection crew did not see it it indicates a superficial inspection.

A witness, Wright, not an employee of defendant, testified that about one o'clock of the morning of the day of the accident he was walking along the right-of-way, near the place where plaintiff was injured, and tripped over a wire; upon the trial he was shown the wire which plaintiff had introduced in evidence and after examining it said he could not be positive it was the same wire although it looked like it; subsequently he changed his evidence as to the time and said it was about 1:00 A.M. of January 10 when he stumbled over the wire. Wright's testimony is attacked by defendant's counsel. When testifying he had said that on the night of the accident he had been working at the city hospital of Parkersburg and was at the hospital when plaintiff was brought there, and that he, Wright, saw him; on the motion for a new trial defendant introduced an affidavit by Wright to the effect that after thinking over the matter he had concluded he was not working at the city hospital on the night to which he had testified but, by looking up certain records, he had



ascertained that on the night of January 12 he was playing a violin in an orchestra. The trial court commented upon this change of Wright's statement and recognized that the reference to having seen plaintiff brought to the hospital was untrue. Yet the trial court, judging from the demeanor of Wright while testifying, was of the opinion that he stumbled over a wire there on the right-of-way as he testified. It was peculiarly the province of the jury to pass upon the truth of Wright's story of stumbling over the wire. If the jury believed what he said with reference to the wire, this was some evidence that the wire had been at the place in question <sup>Some time before plaintiff tripped over it</sup> ~~approximately~~ <sup>it</sup> ~~ly~~ <sup>6</sup> ~~sixty-eight hours before plaintiff tripped over it.~~ In any event there was sufficient evidence to justify the jury in believing the wire had been there a sufficient length of time that an adequate inspection by defendant's crew would have discovered it.

Defendant asserts that the trial court erred in striking an additional answer filed by defendant. This set up that a proceeding was instituted in a court of common pleas of Washington County, Ohio, seeking to restrain plaintiff from prosecuting this suit in the Superior court of Cook county, and that such a restraining order was entered. The trial court properly struck this answer. The facts presented are on all fours with those considered by this court in Taylor v. Atchison T. & S. F. Ry. Co., 292 Ill. App. 457, where we affirmed the order of the trial court in striking this defense.

It is said that the verdict of \$17,000 is excessive. In addition to the loss of four fingers on plaintiff's left hand, the entire hand is permanently contracted to a cup-like shape with loss of action; the wrist is likewise involved; plaintiff cannot grasp or hold anything in this hand; his annual earnings were \$2160; when injured he was fifty-four and two-thirds years of age and his life expectancy at that time was slightly over eighteen years. The jury could also make an allowance for pain and suffering. We are not convinced that the amount of the verdict should be changed.

Plaintiff asserts that in a cause of action arising under



the Federal Employers' Liability Act the federal rule of law prevails, and the question of excessiveness of a verdict is not open in a court of appeal. A number of cases arising in the Federal courts holding this is the rule in the Federal court are cited. The only Illinois case he cites is Stott v. Thompson, 294 Ill. App. 450. In that case the court indicated that it would not be inclined to disturb the verdict, but proceeded further to follow the rule stated in the Federal court cases and arrived at the conclusion that it could not consider the amount of damages. We are not disposed to hold with this latter conclusion for a number of reasons. In our Practice act, chap. 110, sec. 92, sub-par. (f), the reviewing courts of this state are given power to order "the entry of a remittitur." In Chicago I. & L. Ry. Co. v. Stierwalt, 87 Ind. App. 478, in an action for damages under the Federal Employers' Liability Act the state court held it had authority to reverse a judgment on the ground that the damages were excessive or to require a remittitur under the authority and right given by the state statutes. It has been the universal practice in Illinois to order a remittitur in a proper case. In North Chicago Street R. Co. v. Wrixon, 150 Ill. 532, the opinion lists many such cases. See also Maier v. New York C. & St. L. R. Co., 290 Ill. App. 267.

In the Federal court cases cited by plaintiff, some of which are cited in the Stott case, it was held that in cases brought under the Federal Employers' Liability Act the reviewing court could not consider any questions of fact. In the instant case both parties have presented and argued the weight of the evidence, so that plaintiff is occupying an inconsistent position in seeking to bar this court from the consideration of the amount of damages, which is a question of fact.

Upon the entire record we see no sufficient reason to reverse, and the judgment is affirmed.

AFFIRMED.

Wachett, P. J., and O'Connor, J. concur.

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40788

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error.

vs.

WILLIE BOTTIS,  
Plaintiff in Error.

VERCY TO

MUNICIPAL COURT

OF CHICAGO

303 I.A. 232

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

Upon trial by the court defendant was found guilty of carrying a concealed weapon in violation of par. 156, chap. 38 of the Illinois statutes and was sentenced to serve a term of six months in the House of Correction and fined \$10. He seeks a reversal.

November 30, 1938, defendant was stopped by Patrick McNicholas near the plant of Armour & Company where defendant was employed; McNicholas felt defendant's overall pocket and took hold of a gun. Patrick Meedy testified he was employed by Armour & Company; that he saw the butt of the gun protruding out of defendant's pocket and told McNicholas about this. Charles Charvat, a police officer, testified that he was informed defendant had a gun; he asked him where the gun was and was told by defendant, "In my pants pocket." The officer arrested defendant and took the gun out of his pocket. It was loaded with four bullets.

Defendant testified that he was a member of a certain union and a rival union wanted him to join their organization; that he was carrying this gun because about three weeks prior to his arrest five or six men in the washroom at Armour & Company threatened him; that he told the police officer to search him and that he was carrying a gun.

Defendant says that the motion to suppress the evidence should have been granted, as the arrest, search and seizure was in violation of the state constitution. Secs. 2 and 6, article 2. To this the People reply that when one consents to the search of his person and requests the police officer to search him he waives all

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rights to complain that his constitutional rights have been involved. This is the holding in People v. Akers, 327 Ill. 137; People v. Mirbelle, 276 Ill. App. 533 and Driskill v. United States, 281 Fed. 146.

The trial court had made its finding of guilty, but before formal judgment was entered the Assistant State's Attorney representing the People made the statement to the court that defendant had been placed on probation for carrying concealed weapons two years before. The facts are not in dispute in this case. Defendant was clearly guilty, so that the trial court could not have been influenced by the remark made by the Assistant State's Attorney. Moreover, the record fails to disclose any objection made by defendant to this remark, hence the point cannot be raised for the first time in a reviewing court. People v. Spencer, 264 Ill. 124, 135.

There is no merit in the contention that defendant had a right to arm himself after he had been threatened. The threat was made about three weeks before defendant was arrested. He testified that he knew it was wrong to carry a gun. We know of no right or authority where under such circumstances, without any license, a citizen may arm himself.

Defendant says the gun was not concealed. The evidence is to the contrary. The police officer took it from defendant's pants pocket. It is not necessary for the gun to be completely hidden. People v. Garwood, 317 Ill. 578.

The gun was readily accessible to defendant, and the judgment of the court was proper and is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J. concur.

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WILLIAM M. BINDELL,  
Appellant,

vs.

CONLON CORPORATION, a  
Corporation,  
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

303 I.A. 232<sup>2</sup>

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for approximately \$25,000 for services which he alleged he rendered defendant in procuring a contract between it and the Norge Division of Borg-Warner Corporation with reference to manufacturing ironing machines; at the close of plaintiff's case the trial court directed a verdict in favor of defendant and judgment was entered from which plaintiff appeals.

In 1926, plaintiff became a director of defendant company; the oral contract, which is the basis of the suit, was made while plaintiff was a director. The trial court was of the opinion that because of this fact it was plaintiff's business to promote defendant's affairs and that no contract to pay him for such services could be implied. We are of the opinion that an additional reason supporting the conclusion of the court is, that the evidence shows plaintiff was not the procuring cause of the contract with Borg-Warner.

In 1930, Mr. Conlon, president of defendant company, had a conversation with plaintiff in which Conlon expressed a desire to sell his company to some other company in the same line of business, one phase of which was manufacturing ironers and their sale to housewives through dealers. A sale or merger of the entire business was discussed. The Borg-Warner company had acquired various other companies, among them the Norge company; its technical assistant to the president was Mr. K. E. Lyman, with whom plaintiff had a conversation, suggesting that Borg-Warner company take over defendant company; Lyman investigated the proposition and after discussing it with Mr. Davis, the president of Borg-Warner, told plaintiff that his company



did not wish to buy the defendant company. The objectionable feature apparently was the financial condition of defendant company. This refusal was in the early fall of 1930.

Thereafter, plaintiff apparently dropped the matter entirely. He did nothing until the late summer of 1934, when he saw an advertisement in the Chicago Tribune which recalled the matter to his mind. He had an acquaintance, a Mr. L. C. Murdock, who was engaged in the business of effecting mergers and consolidations. Plaintiff asked Murdock to represent him, and plaintiff 'phoned to Conlon, defendant's president, and told him that with Murdock's help the deal might be revived.

Plaintiff did nothing further in the matter. Murdock became active and talked with Mr. Kraft, a representative of Borg-Warner, about purchasing the defendant corporation and was told that Borg-Warner was not interested, and Murdock so reported to Conlon. Murdock had suggested to Kraft that defendant might manufacture ironers for Borg-Warner, but Kraft said he was not interested.

Murdock testified that a month or so later Kraft 'phoned him that they might enter into an arrangement for defendant to manufacture ironers. As a result a contract was made on March 11, 1935, between defendant and the Norge Division of Borg-Warner Corporation for the manufacture by defendant of ironers, and under this contract \$427,337.04 of business was done. Plaintiff seeks 5 per cent of this amount as his commission.

The evidence is undisputed that plaintiff did not effect any sale or merger of defendant and that he had nothing to do with the contract for the manufacture and sale of ironers. He was never employed for this purpose and did nothing to secure such a contract.

Plaintiff argues that his evidence made a complete prima facie case in his favor, but an examination of his testimony clearly shows that what Conlon and plaintiff had in mind in their conversation in 1930 was a sale or merger of defendant with some other company in the same line of business. Plaintiff in argument seeks to stretch the meaning of the words used by Conlon that he desired to





sell or merge his company or "some other arrangement with a company in the same line of business" to cover a contract to manufacture ironers. The conclusive evidence that such a contract was not in the minds of the parties is shown by the fact that plaintiff made no suggestion to anybody of such a contract during the four years after this conversation with Conlon had taken place and the refusal of the Borg-Warner company to consider any purchase of or merger with defendant.

The contract to manufacture ironers was made while plaintiff was a director of the defendant, and the trial court correctly held that this prevented any recovery of commission by him. An important phase of defendant's business was the manufacture and sale of ironers. It was the duty of a director to find advantageous customers. Even adopting plaintiff's theory that he was the procuring cause in obtaining the contract for the manufacture of ironers, this would be within the scope of his duties as director. In Stevens v. Industrial Commission, 346 Ill. 495, it is said, "It is well established that the directors of a corporation cannot receive compensation for the performance of their duty as directors or as officers of the corporation unless compensation is provided for by a by-law or resolution of the board of directors before the services are rendered." There is no claim that there was any by-law or resolution adopted by the board of directors with reference to such services. This principal has been held in other cases. Purchase v. Atlantic Safe Deposit etc. Co., 81 N.J. Eq. 344; Union Trust & Savings Bank v. Hall, 202 Ill. App. 578; Gale v. Carter, 154 Ill. App. 478, and Cheaney v. L. B. & M. R. W. Co., 68 Ill. 570.

Cases involving services wholly apart from the duty of a director, such as Chicago Macaroni Co. v. Boggiano, 202 Ill. 312, are not in point.

We are of the opinion that the record supports the ruling of the trial court, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J. concur.



40617

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

HAROLD JACKSON,

Plaintiff in Error.

APPEAL TO THE

CRIMINAL COURT OF

COCK COUNTY.

303 I.A. 233

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The grand jury returned an indictment in four counts against Frieda Hanief, Patricia Wahl (otherwise called Frances Carter), Harold Jackson, Jacob J. Stahl, William Kieffer, Margaret Kieffer and Eddie Szczepanek, charging in the first count that they conspired to obtain \$50,000 from the Chicago, Indiana and Louisville Railway Company by means of false pretenses. The second count was substantially the same. In the third it was charged that defendants conspired to suborn perjury and to commit perjury in connection with the personal injury case of Rosemary Kieffer against the railway company, and the fourth count with conspiracy to cheat and defraud the railway company and to suborn perjury in the personal injury case. Defendants, Jackson and Stahl, were awarded a separate trial and the other five defendants all testified for The People. The court submitted four forms of verdict, (1) "We the jury, find the defendant guilty of conspiracy in manner and form as charged in the indictment, and we fix his punishment at imprisonment in the penitentiary and a fine of \_\_\_\_\_ dollars \*\*\* not to exceed two thousand dollars." The second form was the same except the jury were to fix the punishment at imprisonment in the penitentiary. The third form was, "We, the jury, find the defendant guilty of conspiracy in manner and form as charged in the indictment." And the fourth was a not guilty form. The jury returned a verdict against Jackson finding him "guilty of conspiracy in manner and form as charged in the indictment." Stahl was also found guilty. The court sentenced

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Jackson on the verdict to a term of six months in the county jail and he prosecutes this writ of error.

The record discloses that on April 16, 1935, Rosemary Kieffer, then about seven years old, was struck and severely injured by a Chevrolet coupe and trailer, driven by William Naylor near Michigan City, Indiana. She brought suit in the Circuit court of Cook county against Naylor and the railway company to recover damages for personal injuries. Naylor who lived in Michigan, was not served. The jury, on July 10, 1937, returned a verdict in plaintiff's favor against the railway company for \$50,000. The railway company made a motion for a new trial and while the motion was pending employed detectives who investigated the matter on the theory that the suit was based on a fraudulent claim, and obtained statements from many witnesses who had testified in the civil suit, in which such witnesses said the evidence they had given on the trial was false. The motion for a new trial was heard and on November 29, 1937, was allowed. Afterward the matter was presented to the grand jury and the indictment returned.

The evidence shows, that near Michigan City, Indiana, the railway company's track runs north and south and is crossed by U.S. Highway 20, a four-lane, paved road running east and west. William Naylor lived in Michigan, some distance east of Michigan City, and was engaged in the egg and poultry business bringing his produce to Chicago in a truck which he drove. About two-thirty o'clock on the afternoon of April 16, 1935, as he was returning home, driving east at about thirty-five or forty miles an hour on Route 20 and when a short distance east of the railroad track, the truck struck Rosemary Kieffer, severely injuring her.

In the trial of the civil case, plaintiff's evidence was to the effect that the railway crossing was in a bad state of repair - very rough - and as Naylor crossed the track his truck bounced up, he lost control of it, and it struck the child who was on the shoulder south of the paved roadway and about fifty to seventy-five

Jackson on the witness stand, and he produced the child.

The record of the case is as follows:

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pair - very rough - and as Naylor crossed the track his truck bounced

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shoulder south of the paved roadway and about fifty to seventy-five

feet east of the railroad track. On the other hand, the railway company's position was that the crossing was in good condition; that the truck did not bounce as it crossed the track but that Rosemary Kieffer ran in front of Naylor's truck, which was traveling about the middle of the two south lanes, and that the accident occurred about 300 feet east of the railroad track.

Naylor was insured by the State Farm Insurance Company of Bloomington, Illinois, for \$10,000 and it was the theory of The People in the instant case, that Jackson was of opinion that on account of the severe injuries suffered by Rosemary, he would probably obtain a verdict for \$50,000. Therefore he decided to make the railway company a party defendant; that to be successful against the railway company he would have to move the accident up nearer the railroad than where it actually occurred. On the other hand, Jackson's theory was that he acted in good faith, relying upon what the witnesses told Stahl and himself, some of whom made written statements September 7, 1935, to the effect that the accident occurred from 50 to 75 feet east of the railroad track.

As stated, many of the witnesses, who testified on behalf of plaintiff in the civil suit, including the five defendants indicted with Jackson and Stahl, repudiated the testimony they gave in the civil case and substantiated The People's theory, and further, that the false testimony they gave in the civil case was caused by Jackson and Stahl who knew the real facts, namely, that the accident happened as The People contend.

Defendant contends the court erred in the admission and exclusion of evidence; (1) that over objection, the court permitted witnesses to testify to what was said and done out of the presence of defendant before the inception of the alleged conspiracy and after its termination; (2) that the court erred in not permitting defendant to testify as to his reasons for negotiating with the insurance company and that he intended to start a separate suit against Naylor; (3) that the verdict and judgment are "contrary to the weight of the

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evidence;" (4) the court erred in giving an instruction, and (5) that the conduct of the prosecutor was highly improper and prejudicial.

(1) That over objection the court permitted Naylor, the driver of the truck which struck the child, to testify that immediately after the accident Margaret Kieffer, who was then fourteen years old and who was with Rosemary, her sister, said that Naylor was not to blame. We think there was no error in the ruling of the court. The jury might find that this evidence would tend to show how the accident occurred and that the claim in the civil suit was without merit but was fraudulently prosecuted by Jackson and the others. That the court erroneously permitted Whittaker (a detective who investigated witnesses in Indiana for the railway company, pending the motion for a new trial) to testify that he went to the neighborhood where the accident occurred and interviewed witnesses, including Frieda Hanief, who lived near the scene of the accident, and who said to him that the testimony she gave on the trial of the civil cause was "a pack of lies." In support of this contention, counsel for defendant says, "This supposed statement was purely in the nature of a recital of a supposed past event, could not in any way be construed to be in furtherance of the design of the supposed conspiracy, and is subject to the additional infirmity that, in point of time, it occurred long after the termination of the supposed conspiracy," and People v. Bither, 231 Ill. App. 301, and People v. Bither, 334 Ill. 264, are cited. The testimony of one conspirator, although out of the presence of another conspirator, is admissible if what is said and done is in furtherance of the conspiracy - the common design - Spies v. The People, 122 Ill. 1. Such testimony is also admissible if what is said or done after the commission of the crime is to conceal the offense. Smith v. State, 171 S. E. 578.

In the Bither case (231 Ill. 301) Bither and Kaup were charged with conspiracy to obtain money belonging to the Board of Education of Chicago. Kaup was called before the State's Attorney

trial.

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Education of Chicago. Karp was called before the State's Attorney charged with conspiracy to obtain money belonging to the Board of

In the Ritter case (231 Ill. 301) Ritter and Karp were

crime is to conceal the offense. People v. Ritter, 191 Ill. 301.

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People v. Ritter, 191 Ill. 301. Each testimony

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and questioned before a stenographer and police officer and in response to inquiries he stated he had paid \$20,500 for certain buildings. The testimony of the police officer and Assistant State's Attorney, as to what Kaup had said at the time, was admitted over Bither's objection. The court said the State's Attorney was permitted to argue to the jury (as an inference from the testimony of these witnesses taken in connection with other facts) that Kaup had paid the money to Bither and held it was reversibly erroneous to permit such testimony, saying, "While these statements were properly received as admissions against Kaup, they were not admissible as to Bither. They were mere narratives as to what had been done. They were not made in Bither's presence and were not acts done or declarations made in furtherance of the conspiracy." The other Bither case (334 Ill. 264), was a disbarment proceeding growing out of the criminal case. The court there said that Bither "testified positively that Kaup never paid anything" to him and referred to what the witnesses testified Kaup had said as a confession by Kaup. And the holding of the Appellate court, that the testimony was erroneously admitted and prejudicial was approved.

The testimony of Whittaker should have been excluded, People v. Patris, 360 Ill. 596. In that case the court said: "Confessions or admissions of one charged with a crime, made out of the presence of a co-defendant, are not competent as against the co-defendant. (People v. Barragan, 337 Ill. 531; People v. Buckminster, 274 Id. 435.)"

Complaint is also made to the admission of the testimony of Patricia Wahl, (otherwise called Frances Carter, who was indicted in the instant case) Hinton J. Clabaugh, Stephen A. Carlin, and others. The testimony of Patricia Wahl is to the effect that when she was arraigned, the Assistant State's Attorney in charge, advised her to plead not guilty at the time, although she had indicated a desire to plead guilty; that afterward she had several conferences with the public defender of Cook County and changed her

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conferences with the public defender of Cook County and changed her  
desires a desire to plead guilty; that afterward she had several  
advised her to plead not guilty at the time, although she had in-  
when she was arraigned, the Assistant State's Attorney in charge,  
and others. The testimony of Patricia Wahl is to the effect that  
dicated in the instant case) Winston A. Lindbergh, Captain. Larkin,  
of Patricia Wahl, (otherwise called Patricia Wahl, who was in-  
Complainant in case No. 1, captioned as above.)

plea to that of guilty. We think this evidence should have been excluded. The jury might well infer that the public defender believed there was a conspiracy, as charged.

The testimony of the witness, Clabaugh, was that he had been employed by the railway company to investigate the facts, pending the motion for a new trial of the civil case; that he went to Indiana and interviewed some of the witnesses, particularly Frieda Hanief, took her to the office of the attorneys for the Insurance Company in LaPorte, Indiana, and had her make a statement which was taken down by a stenographer, and that the representative of the railroad there present, did not make any promises to Frieda Hanief.

The testimony of this witness, (Clabaugh) would in no way tend to show that Jackson was guilty of the charges made against him in the indictment and for which he was on trial, except that the jury might reasonably infer that the statement there made by Hanief was the same in substance as the testimony she gave on the trial. It was improper to corroborate her testimony in this way.

Carlin, a court reporter who took the evidence in the civil suit for Jackson, testified to many things, not necessary to be mentioned here, clearly tending to show he was an accomplice in the conspiracy. He was called and testified for The People. After cross-examination by counsel for defendant the Assistant State's Attorney conducted a redirect examination as to what he and defendant Jackson did in procuring affidavits from people in Indiana and about the civil case and that the affidavits they there took should be sworn to before a notary of that state. The witness afterward fell out with Jackson, one of the reasons being he had not been paid, etc. He was asked on redirect as to what took place when he went to the State's Attorney's office, as to whether he should go back to Jackson's office and what was said between him and the Assistant State's Attorney at that time. This was objected to but we think there was no error in the ruling because the matter had been touched upon by counsel for defendant in cross-examination.



(2) It is claimed the court erred in refusing to permit defendant to answer questions put to him while testifying in his own behalf as to his "reason for carrying on any negotiations or communicating with the insurance company if not other than the request of Mr. Kieffer," and that the court afterward would not let defendant testify he intended to start a separate suit against Naylor. It is claimed these rulings were erroneous because defendant's intentions were an issue in the case. The evidence is to the effect that plaintiff first negotiated with the insurance company about its liability under its policy of insurance issued to Naylor, and that later, during these negotiations defendant stated he would not press the claim against Naylor if the latter would take plaintiff's view of the case with reference to the liability of the railway company. Counsel for defendant says it was the theory of The People that defendant, in negotiating with the insurance company, was doing so for the "corrupt purpose of suborning Naylor to testify falsely in support of plaintiff's theory that the railway company was responsible for the accident." We think there was no error in the ruling of the court. Jackson denied he had any such purpose in negotiating with the insurance company and it would add nothing for him to say that he had no improper or corrupt intentions.

(3) Whether the verdict and judgment is contrary to the weight of the evidence, as counsel for defendant contends, or whether the evidence shows defendant was proven guilty beyond all reasonable doubt, we do not stop to discuss since we are of opinion that defendant did not have a fair trial, as the law requires.

(4) Complaint is also made that the court gave an erroneous instruction at the request of The People. The instruction complained of defined the crime of conspiracy, as charged in the indictment, and that defendant could be convicted of no other offense. It then defined an accomplice and said his testimony should be viewed with grave suspicion and acted upon with great caution, and gave the test the jury should apply in determining the degree of cred-





ibility to be given to such testimony and the instruction concluded: "On the other hand, if you believe the purpose of such witness was to tell the truth, the whole truth, and nothing but the truth as to matters by him testified to in the case, and if his testimony carries conviction, and you are convinced of its truth beyond a reasonable doubt, you have the right to rely upon it." The objection of counsel for defendant is to the paragraph of the instruction just quoted because it told the jury they had the right to rely upon the testimony of an accomplice, and People v. Weitzman, 362 Ill. 11, is cited.

In that case the instruction which was held to be erroneous defined an accomplice and told the jury the testimony of such a witness is liable to grave suspicion and should be acted upon with great caution, and continued: "If the testimony of an accomplice carries conviction and the jury are convinced of its truth beyond a reasonable doubt they should give it the same weight as would be given to the testimony of a witness who is in no respect implicated in the offense and the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness." The court there said: "The last phrase of this instruction, 'and the credibility of such an accomplice is for the jury to pass upon as they pass upon the credibility of any other witness,' is contradictory and should not have been included. It is in direct violation of what this court has said in similar instructions in People v. Rongetti, 338 Ill. 56, and People v. Lawson, 345 id. 428."

In the instant case, we think the instruction is not analagous to the one condemned in the Weitzman case. The jury were not told they should pass upon the credibility of an accomplice the same as any other witness. We think the instruction was not reversibly erroneous. People v. Lawson, 345 Ill. 428.

(5) Complaint is also made of the conduct of the Assistant State's Attorney throughout the trial, including his argument to the jury, and a number of matters are complained of. We shall refer but to a few of them. In the cross-examination of defendant Stahl,



the prosecutor said to him, "you got a lot intelligent on direct examination." And again, "I just wanted to straighten you out, of course, you left a very bad impression." And when counsel for defendant was endeavoring to advise the jury as to the meaning of the term "covenant not to sue" (there being evidence that defendant in negotiations with attorneys for the insurance company before the trial of the civil case, tended to show he had said to the insurance attorneys that if Naylor cooperated with plaintiff in the trial of the civil case, he would execute a covenant not to sue Naylor, for a small consideration, and defendant had been referred to as a lawyer), the prosecutor said: "I do not know anything about a lawyer. I know of Harold Jackson, at 139 N. Clark St., that is all I knew about it so far from the witness stand." And again, "ask him now, qualify him as a lawyer \*\*\* Your Honor, I would like to get the qualifications of this man before he testifies." Again near the close of defendant's direct examination he testified he only wanted an opportunity to try the child's personal injury case, "and that in the criminal case I was in here insisting on a trial and asking for one." He was then cross-examined: "Q. But at the same time your lawyer was in here with motions to quash, was he not?" The objection was sustained and the prosecutor then interrogated defendant at considerable length, most of the questions being answered, over objections, as to whether the motion to quash did not delay the trial and how the case could be tried until the motion was disposed of. The prosecutor then called for the files of the case, to which counsel for defendant objected, stating he had prepared the motion to quash and was alone responsible, to which the prosecutor replied: "There are no motions going to be exposed here." The prosecutor then went into the fact that the case had been before the chief justice. A great deal of time was taken up on this phase of the case, all of which, we think, should not have been permitted because there appear to be no unusual motions made in the case. A great deal more is in the record as to how the prosecutor acted in the examination of witnesses,

the prosecutor said to him, "I am not going to  
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and was answering  
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prosecutor said to him, "I am not going to  
Harold, and he said, "I am not going to  
for from the jury, and the judge, and the  
a lawyer, and he said, "I am not going to  
this was before the jury, and the judge, and the  
directly to the jury, and the judge, and the  
the child, and he said, "I am not going to  
was in a very good position to  
prosecutor said to him, "I am not going to  
with justice, and he said, "I am not going to  
and the prosecutor, and he said, "I am not going to  
most of the evidence, and he said, "I am not going to  
the motion to go to the jury, and he said, "I am not going to  
be tried until the jury, and he said, "I am not going to  
called for the jury, and he said, "I am not going to  
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usual motions made in the case. A great deal more is in the record  
as to how the prosecutor acted in the examination of witnesses,

etc., most of which we think was improper and prejudicial but which we think need not be further mentioned here. In his argument to the jury the prosecutor, among other things, in referring to the civil case in which the new trial had been granted said: "Little Joe Mary has not been forgotten," and "will not be".

Jackson, in his own behalf, testified in substance that pending the motion for new trial in the civil case, when the matter was being investigated by the State's attorney and before the indictment, he had talked a number of times with the prosecutor and that the prosecutor said if the civil suit were dropped, the investigation of the criminal phase of the matter would also be dropped. Afterward, defendant in his own behalf, in his argument to the jury, referred to the fact that although he had testified to what had been said between him and the prosecutor, above referred to, yet the prosecutor had not denied this conversation. And in the prosecutor's closing argument, referring to this matter he said: "and he said he had a conversation with me in the County building, in which I stated to him that if he would drop the Monon case that I would drop the investigation in this office. \*\*\* He argues to you now, why didn't I take the stand and deny it. \*\*\* but because Mr. Jackson has said I refused and that I wouldn't deny it and did not dare to deny it under oath, I say, as God is my judge, it never happened. (raising right hand.) And under my oath as a lawyer, I said to him - ". Defendant's counsel: "I object to this. He asked you to take an oath. This is improper argument." The prosecutor: "I will take it every day in the week." The Court: "He may continue." We think it obvious the argument was highly improper. People v. Munday, 280 Ill. 32; People v. Gilday, 351 Ill. 11; People v. Schneider, 362 Ill. 478.

For the reasons stated, the judgment of the Criminal court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P.J., and McSurely, J., concur.

of Cook County is reversed and the writ granted.

RECEIVED THE SECRETARY OF THE ARMY

Katobest, L.L., and Hargrave, J.J., 1967.

40723

DAVID S. MALONEY,  
Appellee,

vs.

CITY OF DES PLAINES,  
Municipal Corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

303 I.A. 233<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover \$2,593.20 for services rendered by him in connection with a condemnation and special assessment proceeding. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The complaint was in two counts, the first based upon a written contract entered into between the parties, and the second sought to recover for the reasonable value of the services rendered.

The defense set up in answer was (1) that the contract sued upon was illegal; (2) that since plaintiff was a de facto city attorney and therefore a de facto official of the city, he could not receive more than the salary fixed in the appropriation ordinance because such salary could not be increased during the term of office, and plaintiff being the city attorney, could not recover on the second count of his complaint.

The record discloses that May 24, 1929, the city council passed a resolution, the substance of which was that the city needed an attorney of technical experience in connection with special assessments and that plaintiff was specially equipped to handle such matters; that he had expressed a willingness to do so and to accept in payment for his services vouchers payable out of the special assessment. And it was resolved that plaintiff be employed for that purpose as per contract which was then presented, approved and made a part of the resolution, unanimously passed by the city council and

a part of the resolution, unanimously passed by the city council and  
purpose as per contract which was then presented, approved and made  
assessment. And it was resolved that liability be applied for that  
in payment for his services rendered, a bill of the special



approved by the mayor. The contract recites the substance of the resolution, and employs plaintiff in condemnation and special assessment matters as well as other matters for the city, and that he was to be paid for his services by vouchers issued in special assessment and condemnation proceedings. The amount of compensation was to be a sum equal to five per cent of the judgment of confirmation and the vouchers were to be issued payable out of the first installment. The contract further provided that the city should not be liable for any compensation for services rendered by plaintiff other than those in special assessment and condemnation matters "unless provision for such compensation is made at the time of the request \*\*\* but said attorney shall receive additional compensation for services rendered in connection with other than ordinary and routine matters, such as services rendered in litigated matters;" that plaintiff was to handle all work in connection with special assessment and condemnation matters pursuant to ordinances and under the direction of the Board of Local Improvements, and that plaintiff should not be paid for any services rendered in such matters unless an ordinance was enacted by the city council and approved by the mayor. The city had the right to terminate the contract at any time by giving 30 days' notice and paying for services rendered up to that time. There was a further provision that in the event plaintiff was discharged, the city should pay an amount equal to 2-1/2% of the amount of the assessment confirmed.

The evidence further shows that after executing the contract plaintiff entered upon the discharge of his duties, and so far as the instant case is concerned, did the necessary work in preparing a special assessment proceeding which was filed in the Superior court of Cook county where the matter was heard and judgment of confirmation entered for \$50,244. Afterward the contract was let in the usual way and the contractor gave the bond required but no work was done, and about two years after judgment of confirmation was entered,



the work was abandoned and some of the grading and top dressing of the streets was done by the WPA.

Plaintiff testified somewhat in detail as to the work he did in connection with the assessment in question; that the services he rendered were reasonably worth \$2,600, being five per cent of the judgment of confirmation, and that he refused an appointment as a city attorney but did work as attorney for the city not only in this assessment but in other matters for the city as requested.

Benjamin F. Langworthy, a practicing lawyer familiar with the services in connection with such cases testified that the fair, reasonable and customary fee for the services performed would be \$2,600.

The record then discloses that to avoid unnecessary expenses the parties stipulated the facts showing the employment of Maloney under the contract above mentioned, the work he did in connection with the special assessment and condemnation proceeding; that the ordinance for the improvement provided that the cost of the improvement including a sum not exceeding six per cent or \$2,964, be paid out of the special assessment; that the assessment proceeding was filed in the Superior court, the assessment confirmed, the contract let and it was further stipulated that the reasonable charge for the services rendered by plaintiff was \$2,593.

Defendant then offered in evidence certain sections of the city ordinances providing for the appointment of a city attorney by the mayor, with the advice and consent of the city council, defining his duties, and that his compensation should be such as the mayor and the city council may direct. Defendant also introduced in evidence the Annual Appropriation Ordinance for 1929 which showed that the city attorney was to receive \$250 for his services for the year. In 1930 the Annual Appropriation Ordinance provided for "Fees of Attorney and Assistants, \$2,500. The above appropriation shall not include fees and compensation for legal services in Special Assessment proceedings. "

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Defendant contends that plaintiff was city attorney and his compensation fixed by the Appropriation Ordinance and therefore he could not receive extra compensation and that the written contract of May 24, 1929, entered into between plaintiff and defendant was illegal. A great number of authorities are cited, all tending to support counsel's contention, but we think it would serve no purpose to discuss this question because the question before us has been decided adversely to defendant's contention by the Supreme court and by this court.

In Gray v. City of Joliet, 287 Ill. 280, Gray brought an action of assumpsit against the city of Joliet for the value of services rendered in making and spreading assessment rolls, which proceedings had afterward been dismissed and abandoned by the city. He recovered a judgment of \$870, which on appeal to the Appellate court was reversed and on a further appeal to the Supreme court, the judgment of the Appellate court was reversed and the judgment of the trial court affirmed. In that case the special assessment ordinance provided that all expenses of making and collecting assessments should be levied in the special assessment proceeding in accordance with section 94 of the Local Improvement Act. The court there said: "We are referred to decisions of this court that a city cannot be made generally liable to a contractor by mere evasion or neglect of duty on the part of its officers to collect an assessment but he must look to the collection of the assessment for his money." The court then cites cases and discusses sections of the Local Improvement Act, and continuing said: "These sections contemplated the assessment would be levied and collected, or if for any reason it could not be collected, that a valid assessment would be made, and the person having a claim against the assessment was given his remedy by mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

Defendant contends that plaintiff's action is barred by the statute of limitations. Plaintiff's complaint was filed on May 24, 1961, and the statute of limitations is three years. Plaintiff's cause of action accrued on May 24, 1958, when the defendant failed to pay the plaintiff the amount of \$10,000.00. Plaintiff's cause of action is not barred by the statute of limitations. The defendant's motion to dismiss is denied. The plaintiff's complaint is allowed to stand. The plaintiff is entitled to judgment as a matter of law. The defendant is liable to the plaintiff for the amount of \$10,000.00. The plaintiff is entitled to interest on the amount of \$10,000.00 from May 24, 1958, to the date of judgment. The plaintiff is entitled to costs of suit. The plaintiff is entitled to a writ of mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

Act, and continuing said : "these sections shall be construed to mean that if the assessment is levied and collected, or if for any reason it should not be collected, that a valid assessment would be made, and the person having a claim against the assessment was given his remedy by mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

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with section 10-101. The defendant's motion to dismiss is denied. The plaintiff's complaint is allowed to stand. The plaintiff is entitled to judgment as a matter of law. The defendant is liable to the plaintiff for the amount of \$10,000.00. The plaintiff is entitled to interest on the amount of \$10,000.00 from May 24, 1958, to the date of judgment. The plaintiff is entitled to costs of suit. The plaintiff is entitled to a writ of mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

recovered in the amount of \$10,000.00. The defendant's motion to dismiss is denied. The plaintiff's complaint is allowed to stand. The plaintiff is entitled to judgment as a matter of law. The defendant is liable to the plaintiff for the amount of \$10,000.00. The plaintiff is entitled to interest on the amount of \$10,000.00 from May 24, 1958, to the date of judgment. The plaintiff is entitled to costs of suit. The plaintiff is entitled to a writ of mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

section of the city charter which provides that the city shall be liable for the amount of \$10,000.00. The defendant's motion to dismiss is denied. The plaintiff's complaint is allowed to stand. The plaintiff is entitled to judgment as a matter of law. The defendant is liable to the plaintiff for the amount of \$10,000.00. The plaintiff is entitled to interest on the amount of \$10,000.00 from May 24, 1958, to the date of judgment. The plaintiff is entitled to costs of suit. The plaintiff is entitled to a writ of mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

services rendered by the plaintiff. The defendant's motion to dismiss is denied. The plaintiff's complaint is allowed to stand. The plaintiff is entitled to judgment as a matter of law. The defendant is liable to the plaintiff for the amount of \$10,000.00. The plaintiff is entitled to interest on the amount of \$10,000.00 from May 24, 1958, to the date of judgment. The plaintiff is entitled to costs of suit. The plaintiff is entitled to a writ of mandamus or injunction to enforce its collection. But where the city abandons the proceeding, as it has a right to do, before it reaches the final stage of levying the assessment a person like the commissioner having a claim for the preliminary work of preparing

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the assessment roll has no claim against any special fund, for no such fund is raised, and he has no remedy by mandamus to compel the city to levy the assessment, for the municipality has the lawful right to abandon the proceeding and not make the improvement. \*\*\* it cannot relieve itself from liability to pay the reasonable expenses incurred where the city itself voluntarily abandons and dismisses the proceeding before judgment of confirmation." To the same effect is Murrie v. Harper, 249 Ill. App. 586. It was held that where a contractor undertakes to pave certain streets looking wholly to special assessment funds for his pay and thereafter the city abandoned the proposed improvement, the city cannot be enjoined from paying the contractor for work he has done. The court there cites a number of authorities, including the Gray case, above quoted from, and distinguishes the case of De Kam v. City of Streator, 316 Ill. 123, cited by counsel for the city in the instant case. And in Markman v. City of Calumet, 297 Ill. App. 531, it was held that an attorney who had rendered services in a special assessment proceeding and agreed to look for payment for his services to the special assessment fund, but where the work was not done and no assessment collected, the attorney could recover the reasonable value of his services. It was there contended that no recovery could be had because there was no appropriation made prior to the employment of Markman. But this was held untenable, saying: "It is further urged on behalf of defendant that the provisions of section 4, article VII of the Cities & Villages Act (Ill. Rev. Stat. 1937, ch. 24, p. 365 [Jones Ill. Stats. Ann. 21.196]) require a prior appropriation before officials of a municipality are authorized to enter into a contract. In the case at bar the work performed by Markman was under a contract providing that he was to be paid out of the special assessment fund, and defendant contends that that is the only manner in which Markman and the other two plaintiffs could be paid." In that case the opinion was by Mr. Justice Friend who discusses the authorities, including





the Gray case. To the same effect is Bunge v. Downers Grove San. Dist., 356 Ill. 531, where it was held that where a municipality repudiates its contract for services to be performed in connection with special assessment proceedings and a suit is instituted upon quantum meruit for services actually rendered, the court may properly admit testimony as to the value of such services.

Defendant further contends that since plaintiff failed to file a reply to its answer in which it was alleged that plaintiff was a city official and received a salary as city attorney for 1929, 1930 and 1931, these allegations of the answer stand admitted and therefore plaintiff cannot recover in the instant case. No such contention was made on the trial. So far as the record discloses, this matter was not called to the attention of the trial judge but on the contrary, defendant offered evidence to which we have above referred. In these circumstances, we think defendant ought not now to be permitted to contend that the matters mentioned in its answer stand admitted. An appeal to a reviewing court is to correct errors claimed to have been committed by the trial judge, but if the matters are not brought to his attention, obviously he has committed no error. Moreover, we are of opinion that under the authorities above cited, there is no merit to the contention because under the contract of employment, from which we have above quoted, the defense sought to be interposed is of no avail.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.



40750

THE C. V. MOSBY COMPANY, a  
Corporation,

vs.

HORRY M. JONES and MIDDLEWEST  
INSTRUMENT COMPANY, a Corporation,  
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

303 I.A. 234

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the owner of 40 shares of preferred and 8 shares of common stock in defendant, the Middlewest Instrument Company, filed his complaint in chancery against Horry M. Jones and the Middlewest company praying that Jones be required to assign to the Middlewest company patents and inventions, and that the action taken by the stockholders and directors of the Middlewest company at a meeting held September 10, 1936, be declared null and void. After the issue was made up, the cause was referred to a master in chancery who took the evidences, made up his report and found (1) that Jones was the owner of the patents and inventions in question; (2) that the action taken by the stockholders and directors on September 10, 1936, be set aside, and (3) that there be an accounting between the two defendants. Afterward a decree was entered finding that the patents and inventions belonged to defendant Middlewest company, and that there should be an accounting between defendants. Defendants prosecute this appeal.

The record discloses that Dr. Horry M. Jones, defendant, has a number of degrees from universities, including Doctor of Medicine from Northwestern University, and for many years was diagnosing and treating patients by means of X-ray, and in 1920 began the study of metabolism - which is "the chemical processes going on in the living organism" and he became interested in inventing a machine to be used in treating human ailments; that in 1922 a patent was issued to him for a machine called a "Metabolimeter" which had



prior to that time been sold by him under the name of "Middlewest Laboratories Company." In 1928, he caused defendant Midwest Instrument Company to be incorporated with a capital stock of \$25,000 which was afterward increased to \$50,000. The shares were 50 par value and divided into two classes, common and preferred. Dr. Jones assigned to defendant company the patent pertaining to the metabolismeter, in payment of stock of the company.

November 24, 1928, 32 shares of preferred and 8 of common and June 6, 1929, 8 shares of preferred stock were issued to complainant in payment for advertising, plaintiff having inserted in some of its publications and caused to be published in the American Medical Association Journal advertisements of the machine made by defendant, Midwest company. Dr. Jones owned practically all of the stock of the Midwest company at all times. It was substantially a one-man corporation. At first Midwest company sold but few machines but as Dr. Jones improved the machine through subsequent inventions, the business increased. This is shown by the fact that Jack Reynolds, who was a salesman for the Midwest company and afterward a director, in selling the machine in 1934, earned commissions of more than \$1,200; in 1935, about \$9,000; in 1936, \$10,000 and in 1937, about \$15,000. Dr. Jones, who was the head of the company, worked days and sometimes nights at his place of business, 1870 Ogden avenue, Chicago, and was to have been paid a salary in 1934 of \$8,000, but since the company did not have sufficient cash, he was paid only \$4,800 in cash and given 36 shares of stock. In 1935, his salary was fixed at \$10,000; he received but \$5,000 in cash and 50 shares of stock; in 1936, his salary was fixed at \$12,000, which for the first time was paid in full.

September 4, 1936, the stockholders were notified that it was proposed to increase the capital stock from \$50,000 to \$100,000 and notice was given to the stockholders that a meeting would be held for this purpose on September 10, 1936. Dr. Mosby, who was the head of plaintiff company located in St. Louis, through correspondence, objected to the increase of the capital stock, stating,

[illegible]

among other things, that plaintiff company had held the stock for several years and had received no dividends. The meeting of the stockholders of the Middlewest company was held September 10, 1936, at its place of business in Chicago, pursuant to notice. Dr. Mosby's son, accompanied by plaintiff's counsel, came to Chicago and was shown through the Middlewest company's plant and given information about its business but when the stockholders met, the minutes of the meeting disclose that objection was made to the representatives of plaintiff company attending the meeting on the ground that the stock had not been rightfully issued; that it had been issued to plaintiff "without authority of the board of directors" and the minutes continue that the stockholders denied the right of plaintiff or its representatives to vote as a stockholder and that plaintiff's certificates of stock be cancelled. The stock was not represented at the meeting. At that meeting it was resolved that the capital stock be increased from \$50,000 to \$100,000. The minutes also recite that Dr. Jones refrained from voting and that at that time C. A. Turnell was elected director to fill a vacancy in the board.

The stockholders also, at the time, passed a resolution in which it is recited that Dr. Jones offers to the Middlewest company an exclusive license to manufacture and sell the "new and improved Jones MOTOR-BASAL Metabolism Apparatus with new devices and inventions, and also the Jones Nitrogen Calory Ratio apparatus" for which he was to be paid by the Middlewest company 15 per cent of the gross sales price of the machines. The proposition was accepted by the stockholders. The resolution continues and recites the work that had been done by Dr. Jones in inventing and improving the machine, obtaining patents, etc., and the great amount of work the doctor had put in in accomplishing the result; that on account of the inventions the Middlewest company, from a state of bankruptcy was rendered solvent in 1936; that there were threats of infringements which Dr. Jones alone could combat and save the company, and it was resolved that the contract there tendered by Dr. Jones to the stockholders be executed by the board of directors.





The minutes of the corporation further disclose that immediately following the stockholders meeting, the board of directors met, at which meeting all of the directors were present, they being Jones, Reynolds, Adelman and Turnell, who waived the giving of notice of the time and place of the meeting, and it was resolved that vice president Reynolds be authorized and directed to sign the contract tendered by Dr. Jones on behalf of the Middlewest company. The minutes recite that Dr. Jones refrained from voting. On the same day the contract was executed by Reynolds, as vice president, on behalf of the Middlewest company and by Dr. Jones personally. By the terms of the contract, Dr. Jones gave an exclusive license to the Middlewest company to sell in the United States, the devices covered by his patents and any improvements thereof, specifically mentioning applications then pending, patents #78941 and #78942.

The contract followed the matters mentioned in the minutes of the stockholders meeting. Dr. Jones was to be paid royalties of 15% on the gross sales price of the apparatus sold and there was a provision that the Middlewest company could cancel the contract within 90 days; that any improvements and inventions made by Dr. Jones should be available to the Middlewest company; that after the year 1936 the license granted should cease to be exclusive, in the event the royalties fell below \$10,000 for any year, and the contract further provided that the license granted could not be assigned by the Middlewest company without the consent of Dr. Jones.

Plaintiff contends that defendant Jones was not a mere employee of the Middlewest Instrument Company; that as a practical matter he was not an employee at all because the corporation could act only through him and he could not hire himself; "he was the corporation and took orders from no one. \*\*\* The courts therefore hold that if the circumstances are such that it would be inequitable, or a violation of good faith, for the employee to retain an invention made during the course of the employment, then it should be held, in equity, to be the property of the employer, and the employee re-

[illegible]

quired to assign the patent to the employer." It is argued that under the facts as disclosed by the evidence, the patents and inventions made by Dr. Jones, while he was acting as the head of the Middlewest company, belonged to and are the property of the Middlewest company and the decree of the court to this effect should be affirmed.

The evidence is to the effect that Dr. Jones did practically all of his work in inventing and improving the machine or apparatus involved, while he was at the plant of the Middlewest company, although some of the work seems to have been done elsewhere. He owned and controlled the corporation, in fact, he was practically the corporation. At the stockholders meeting of September 10, 1936, he owned 430 shares of the common and 132 of the shares of the preferred stock; Reynolds had 1 share of common, Miss Adelman 1 share of common, and Turnell 1 share of preferred. One share of preferred and 160 shares of common were not represented at the meeting, and plaintiff, the Mosby Company, represented by a proxy, had 8 shares of common and 40 of preferred stock but the Mosby stock was not permitted to be represented at the stockholders meeting. This appears to have been all the stock issued. At the beginning of the business, Miss Adelman was the stenographer employed on a weekly salary; Reynolds was a salesman and Turnell the advertising man.

There is also in evidence the minutes of the meeting of the directors of the Middlewest company held January 8, 1934, in Chicago, at the Middlewest company's place of business. At that meeting Jones was elected president, Reynolds vice president, and Miss Adelman secretary and treasurer. At that meeting a resolution was unanimously passed retaining Dr. Jones as president at \$8,000 for the year 1934, and his duties were specified as general "office manager," "advertising manager," "production manager" and "sales manager." The duties pertaining to each office were specified. It was further resolved that the salary of \$8,000 to be paid Dr. Jones as general manager and executive head of the company "is not in any sense or form payment or consideration for royalties, now due or to



become due \*\*\* That any and all devices, improvements, chemical formulae and process, articles, books, and inventions, the subject of letters patent or copyright or applications for United States letters patent or copyright or otherwise, now or in the future, are and shall be the exclusive and separate right and absolute property of Dr. Harry M. Jones except insofar as he has by contract with the corporation assigned or granted a license to the corporation to manufacture and sell said devices, improvements \*\*\* in territory designated." And it was further resolved at that meeting of the directors that all new devices, improvements, inventions, etc., of which Dr. Jones "is now or may work on and possess in the future during his connection with the corporation in the above designated capacities or otherwise, shall be his individual property;" that he shall have freedom of action of the workshop, laboratories, etc. of the Middlewest company "to prove and establish the sales and trade value of said ideas, \*\*\* as a basis for a reasonable contract offer to the Middlewest \*\*\* to manufacture and sell under royalty terms."

It is a well established rule of law that "An invention made by an employee, in the course of his employment and at his employer's expense, is the property of the inventor unless he has by the terms of his employment, or otherwise, agreed to transfer to his employer its ownership as designated from its use. It matters not how valuable the invention or how vital its control may be for the success of the business in which it has been conceived." Wireless Specialty Apparatus Co. v. Mica Condenser Co., Ltd., 239 Mass. 158. In that case the court quotes from Solomons v. United States, 137 U.S. 342, as follows: "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer." To the same effect is United States v. Dubilier Condenser Corp., 289 U.S. 178. In that case the



court also held that where a contract of employment did not contemplate invention but an invention was made by the employee during the hours of his employment and with the aid of the employer's materials and appliances, the right of patent belonged to the employee and the employer's interest in the invention is limited to a non-exclusive right to practice it - a "shop-right." In that case an employee of the government of the United States obtained letters patent for an invention which he evolved while in the employ of the government. The court held the employee was entitled to the patent rights; that the United States was entitled to "shop-rights" which means that it could use the patent without charge. The court there said: "The United States is entitled, in the same way and to the same extent as a private employer, to shop-rights, that is, the free and non-exclusive use of a patent which results from effort of its employee in his working hours and with material belonging to the Government."

Applying these principles of law to the facts in the instant case, we are of opinion that the patents and inventions of Dr. Jones, which are involved in the instant case, are the property of Dr. Jones and not of defendant Middlewest company. While the evidence shows that practically all of the work the doctor did in perfecting the invention was performed at the company's plant, yet the evidence shows he had many other duties than perfecting inventions and improvements on the apparatus. This appears from the minutes of the board of directors meeting of January, 1934, from which we have above quoted. This meeting was held more than two years before any trouble arose between plaintiff and Jones or defendant company, or anyone else. His duties are there specified, as we have above stated. It was expressly resolved at that time that all patents and inventions were the property of Dr. Jones. This is the position taken at all times by everyone connected with the company, except plaintiff.

We are also of opinion that the action of the stockholders and of the directors at the meeting held September 10, 1936, including the execution of the contract at that time, was illegal and





of no effect. There was no warrant in the action of the stockholders in excluding plaintiff's representatives from attending that meeting as representing 48 shares of the stock of the Middlewest company.

We are also of opinion that the contract made on that day is unenforceable for the reason that Dr. Jones was in absolute control and dominated the entire proceeding. This too, whether the terms of the contract are fair or unfair. Higgins v. Lansingh, 154 Ill. 301; Adams v. Burke, 201 Ill. 395.

Whether defendant, Middlewest company, is entitled to a "shop-right", that is, to a non-exclusive right to use the patents and inventions made by Dr. Jones without charge or expense, we do not decide because so far as the record discloses, the matter was not considered by the master or chancellor.

By the decree defendant Jones was ordered and directed to account to the Middlewest company for all moneys or property received by him or paid out or expended for his use or benefit by the Middlewest company between January 1, 1934, and the date of stating the account by the master. This was substantially the period fixed by the master. So far as we are advised, no complaint is made to the date fixed by the decree, viz., January 1, 1934, as the beginning of the period of time for the accounting. But we are of opinion that there should be no accounting prior to the date of the meeting September 10, 1936, the date on which the stockholders prevented the representatives of the Mosby stock from appearing and being heard, which is the same date the directors entered into the last contract with Dr. Jones. Plaintiff owned 40 shares of its stock from November 24, 1928, and 8 shares more from June 6, 1929, and apparently made no complaint as to what had been done by the Middlewest company in employing Dr. Jones and making the contract covering the year 1934; and there is no charge that anything done was fraudulent.



It is only the non-assenting stockholders that can complain and there is no suggestion that plaintiff or any stockholder objected to anything that was done prior to the meeting of September 10, 1936. Higgins v. Lansingh, 154 Ill. 301. In these circumstances we think it would be inequitable to now permit plaintiff to say that what had been done by the Middlewest company from January 1, 1934, was illegal and unwarranted.

For the reasons stated, the decree of the Superior court of Cook county is reversed and the cause remanded for further proceedings not inconsistent with what is said in this opinion.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

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FRED GEORGE,

Appellee,

vs.

INTERNATIONAL PRINTING INK  
CORPORATION, a corporation,  
AULT & WIBORG CORPORATION,  
a corporation, INTER-CHEMICAL  
CORPORATION, a corporation,  
and E. RUSSELL LANG,  
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

APPEAL FROM INTERLOCUTORY  
ORDER.

303 I.A. 234<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse an order overruling their motion to dissolve a temporary injunction entered without notice on plaintiff's application. The case is before us on plaintiff's verified complaint supported by an affidavit made by plaintiff.

So far as it is necessary to state here, the allegations of the bill are that the three defendant corporations are foreign corporations having places of business in Chicago, and defendant Lang is an employee and agent of defendant Ault & Wiborg Corporation; that during the period from 1925 to 1935, plaintiff "caused to be developed formulae for inks, compounds, and color solutions for use in a process for the application of said color solutions to the surface of liner board and other corrugated materials; that in connection with the use of said formulae \*\*\* he also during this period developed and adapted a machine to be used in applying" the "inks, compounds, and color solutions to the surface of liner board and other corrugated materials;" and that the process formulae and other data "constituted a secret of his business."

It is further alleged that March 5, 1935, plaintiff caused the Continental Color Corporation to be organized for the purpose of carrying on his business by the use of his formulae; that the corporation conducted business until February 6, 1937; that during the latter part of 1936, certain of defendants made an exhaustive investi-

ALION

THIRD OF MAY

VS.

THE CONTINENTAL  
COLOR CORPORATION  
A CORPORATION  
INCORPORATED  
IN THE STATE OF  
NEW YORK

IN SENATE

1937

While the Continental Color Corporation

has been in existence since 1927

it has never been a public corporation

and has never been a corporation

the bill of 1936

corporation which

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and that the process

his business.

It is further alleged that

the Continental Color Corporation

carrying on his business by the use of his

action conducted business until February 6, 1937; that during the

latter part of 1936, certain of defendants made an extensive investi-

gation of the processes and business conducted by the Continental Color Corporation with a view to acquiring that company, and February 6, 1937, three contracts were entered into, one between plaintiff and the International Printing Ink Corporation, one between the International Printing Ink Corporation and Mitchell Herrick & Company, and the third between plaintiff and the Continental Color Corporation. These three contracts are attached to and made a part of the complaint. Plaintiff sold 124 shares of stock which he owned in the Continental Color Corporation and Mitchell Herrick & Company sold 126 shares of the same stock to the International Printing Ink Corporation, which appears from two of the contracts, which was all of the stock of the Continental Color Corporation.

There are a number of provisions in each of the contracts which we think it unnecessary to mention here except to say that in the Mitchell contract the International, among other things, agreed to pay 1-1/2% of the "net sales of all products of Continental and of all royalties and service charges paid to Continental." The third contract provided the Continental Corporation was to employ plaintiff in the conduct of its business for which he was to be paid \$666.66 per month and 1% "of the net sales of all products of Continental and of all royalties and service charges of Continental during each calendar year"; that the employment might be terminated by either party upon six months' notice. After the sale of the stock of the Continental, as above stated, the business was continued by defendant Ault & Wiborg Corporation. The contract of employment, by its terms, employed plaintiff from February 6, 1937 to December 31, 1942. Plaintiff entered upon the discharge of his duties under the contract of February 6, 1937, and continued until October 18, 1938, when it is alleged he was wrongfully discharged.

One of the provisions of the contract of employment was that "Continental agrees that during such period [February 6, 1937 to December 31, 1942] Continental will not be consolidated or merged with any other corporation nor will it sell or dispose of any sub-





stantial portion of its assets or business otherwise than in ordinary course of business, nor cease the line of business in which Continental is now engaged, provided, however, that this restriction shall not prevent Continental from being merged or consolidated with, or transferring substantially all of its assets and business to, The International Printing Ink Corporation, \*\*\* but in any such case the business of Continental shall be continued as a separate division of such corporation to the end that no substantial prejudice shall thereby be occasioned to the Employee in respect to his right to receive said one per cent (1%) payments, which in such case shall be applied to the net sales of products, royalties and service charges of such division in substantially the same manner as though Continental had continued its present business as a distinct entity."

It is further alleged in the complaint that after the sale of the stock by him and Mitchell, the business of Continental was carried on by defendant Ault & Wiborg Corporation producing the products under the secret formulae and by licensing various manufacturers of liner board under license contracts which provide for the payment of a royalty; that the business of Continental was highly profitable during the years 1937 and 1938, and the prospects for additional customers were encouraging; that Container Corporation of America was one of Continental's customers and was engaged in the manufacture of liner boards and corrugated shipping containers, with its principal plant in Chicago, and that defendants agreed with the Container Corporation to divulge and disclose the secret processes and formulae to the Container Corporation without consideration and "without the payment of any royalty or other form of consideration" as a result of which cartons and containers would be produced at a substantially lower cost than that which Continental would obtain from its other customers; that this agreement with the Container Corporation was made with the intent, purpose and design on the part of defendants to prevent plaintiff from receiving payments justly due and to become due to him under his contract.

In support of his complaint plaintiff filed his affidavit

In support of his complaint plaintiff filed his affidavit  
some due to him under his contract.

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customers; that this agreement with the Container Corporation was  
lower cost than that which Continental would obtain from its other  
of which cartons and containers would be produced, it is substantially  
payment of any royalty on other forms of containers and its receipt  
to the Container Corporation. These defendants and their agents  
Corporation to divide and distribute the business of the Container  
pal plant in Chicago, and to prevent Continental from obtaining  
of liner board and to prevent Continental from obtaining the business  
was one of Continental's agents and to prevent Continental from obtaining  
customers were known to the Container Corporation and its agents  
during the years 1937 and 1938, and to prevent Continental from obtaining  
of a royalty; that the business of Continental was to produce  
of liner board and to prevent Continental from obtaining the business  
those years the business of Continental was to produce and distribute  
carried on by Continental and its agents and to prevent Continental from  
of the stock of Continental and its agents and to prevent Continental from

in which he swears that on or about the 15th of September, 1939, an agreement was entered into between defendants and the Container Corporation and that the Container Corporation was preparing necessary machinery at its plant for the purpose of carrying out the terms of such contract.

The prayer of the complaint was that defendants be required to answer the complaint, but not under oath, and that a temporary injunction issue enjoining defendants from disclosing or divulging any of the processes or formulae to the Container Corporation or any other persons, firm or corporation until the further order of court. A temporary restraining order was entered substantially in accordance with the prayer of the complaint. Afterward defendants' motion to set aside the order awarding the temporary injunction was overruled and this appeal followed.

There is no express covenant in the contract of employment nor in the allegations of the bill that defendants would not divulge the secret processes to others. We think that since it is alleged defendants, in the contract of employment, agreed they would not "sell or dispose of any substantial portion of its assets or business otherwise than in ordinary course of business" and that defendants had agreed to disclose the secret processes and formulae to the Container Corporation, without consideration, as a result of which plaintiff would be damaged, this was sufficient to require defendants to answer the complaint, or at least, to require an affidavit in support of defendants' motion to vacate the injunctive order, if these allegations of the complaint were not true. McDougall Co. v. Woods, 247 Ill. App. 170; DeKalb Trust & Savings Bank v. DePaul Ed. A. Soc., 278 Ill. App. 102; Lee v. Hansberry, 291 Ill. App. 517.

In the McDougall case, which was an appeal from interlocutory orders appointing a receiver and granting a temporary injunction, after summarizing the allegations of the bill we said: "In appeals from interlocutory orders it is not our province to determine the rights of the parties in the subject matter of the litigation,



but simply to determine from the averments of the bill whether the party probably is entitled to the relief sought. \*\*\*

"We do not feel called upon to pass upon the demurrability of the bill or the merits of the cause. It is enough to say at present that the bill presents circumstances which lead to a belief that probably the plaintiff will be entitled to relief." We followed the holding in that case in Lee v. Hansberry, (291 Ill. App. 517) and cited a number of other authorities.

We are also of opinion that plaintiff's remedy at law would not be as complete or adequate as a suit in equity. The allegations tend to show that business was prospering and growing and the Continental Corporation and its successor defendants had a number of customers from whom orders and royalties would probably be received. Ellis Electrical Lab. Sales Corp. v. Ellis, 269 Ill. App. 417.

The order of the Circuit court of Cook county appealed from is affirmed.

AFFIRMED.

Matchett, P.J., concurs.

McSurely, J., dissents.



Filed Jan. 12-1140

Abstract

PUBLISHED IN ABSTRACT

Jerry E. Simpson, Plaintiff-Appellee, v. A. B. Bliss,  
Defendant-Appellant.

Gen. No. 9180

303 I.A. 394

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

Defendant A. B. Bliss has appealed to this Court from a judgment of the Circuit Court of Logan County, Illinois, in favor of plaintiff appellee, Jerry E. Simpson, in the sum of \$1375.26 and costs of suit.

The complaint alleged that between June 15, 1933, and November 24, 1935, plaintiff rendered services as a blacksmith to defendant at his request in and around a certain coal mine being sunk by the defendant in Logan County, Illinois, rendering 2259½ hours of service during that period, for which defendant promised to pay the plaintiff \$1575.45 on the latter date; that the same was not paid although demand therefor was made and plaintiff prayed judgment against the defendant for said amount and costs.

Defendant moved to dismiss the complaint for failure to allege that the plaintiff had suffered damages by reason of the facts and circumstances, which motion was overruled, and defendant thereupon filed his answer denying that plaintiff had rendered services to the defendant as a blacksmith between said dates for a total of said number of hours, but admitted that plaintiff did perform various and sundry services for the defendant, the total time spent in such service being unknown to the defendant, denied promise of payment of the above amount or of any sum of money and cash for the services; admitted that no payment was made and denies that any money was due the plaintiff for such services.

The answer, as a further defense, alleged that plaintiff Simpson, at the time he commenced performance of service for the defendant, was a member in good standing of Local 93, Progressive Miners of America, and continued as such member while performing such services; that defendant had entered into an oral agreement with the officers of said local whereby said officers agreed for and on behalf of all members of the local of which plaintiff was a member that said members would work for the defendant in and about sinking a mine shaft belonging to the defendant; "that the de-





fendant would pay for such work, either in cash or in preferred stock in the corporation to be formed to take over and operate the said mine, at defendant's option, at the regular scale of wages of the said Local for such work, payment to be made when the said mine shaft had been sunk to coal and coal was being produced therefrom in paying quantities. That the said agreement was, by the said officers, submitted to the members and was ratified by an unanimous vote of all the members present. That the said plaintiff was at the time of the making and ratifying of this agreement a member in good standing of the said Local. That the said mine shaft had not been, on the twenty-fourth day of November, A. D. 1935, sunk to coal, nor was coal being produced therefrom on that date, nor has the said shaft since that date been sunk to coal nor has any coal whatever been produced from the said mine shaft to this date, the nineteenth day of April, A. D. 1937." To the above answer and the new matter of defense therein contained, no reply was made by the plaintiff.

It appears from the evidence that prior to October 15, 1934, three coal mines had afforded employment to a large number of miners residing in Lincoln, which mines were closed and the workmen were without employment. The plaintiff Simpson had been a blacksmith employed in two of these mines for thirty years. He became a member of the above mentioned Miner's union, which had remained active, on February 17, 1933, and continued his membership until October 19, 1936.

A number of meetings were held by the union, at which the above proposition was discussed, and at some of these meetings plaintiff Simpson was present. An oral arrangement and agreement was discussed for the purpose of giving work to the men who would sanction it, which agreement was verbal and not in writing. In accordance therewith, miners were selected from the union under an agreement to receive their pay at the union rate in stock of the corporation when coal was produced, with which arrangement between defendant Bliss and the union, the plaintiff was familiar.

Simpson testified that Bliss employed him on June 15, 1933, to work in sinking the mine and offered in evidence memoranda purporting to show that he had worked 23½ hours in June and 17½ hours in July, which work was done at his home, and that he did not work at the mine until November. His employment included work as a blacksmith, in laying brick, setting



boilers and as watchman, the respective hours of each service not appearing, but the aggregate hours he testified to having worked was 2259½ at a wage scale of \$8.64 for eight hours.

Proof was also offered by the plaintiff concerning certain conversations had between him and Bliss at his places of business, at the mine and concerning certain records and actions of the Miner's Union relating to the arrangements between Bliss and the Union, of which the plaintiff was a member. There is a sharp conflict in the testimony of the witnesses concerning the alleged arrangement between the plaintiff and defendant and as to the terms and conditions of the arrangement between the defendant and the Union.

In many respects the facts in evidence and controlling principles in this case parallel those recited in our recent opinion in the case of *Altman v. Bliss*, Gen. No. 9179, and in view of our decision herein, it will not be necessary to recite the evidence in detail.

Much of the evidence of both parties concerns the alleged agreement referred to in defendant's answer, to which no reply nor denial was filed by the plaintiff. Since this evidence referred to an express verbal contract not declared upon by the plaintiff, we hold here, as in *Altman v. Bliss, supra*, that the plaintiff could not recover under the allegations of his complaint.

It is a fundamental rule with no exceptions that a party must recover, if at all, on the case he has made for himself on the pleadings. He cannot make one case on his averments and recover on another ground. *Brodsky v. Frank*, 342 Ill. 110, 173 N. E. 775; *Feder v. Midland Casualty Co.*, 316 Ill. 552, 147 N. E. 468; *Lake St. Elevated R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374; *Fornoff v. Smith*, 281 Ill. App. 232.

It is provided in part by Section 156, Chapter 110, Illinois Revised Statutes, 1939, being Section 32 of the Civil Practice Act, that: "When new matter by way of defense or counterclaim is pleaded in the answer, a reply shall be filed by the plaintiff."

The answer of the defendant pleaded an express contract in the way of an affirmative defense, to which the plaintiff made no reply or denial, and by such failure admitted the truth of said allegation. *Wiedoeft v. Frank Holton & Co.*, 294 Ill. App., 118 (126), 13 N. E. (2d) 854; *Fornoff v. Smith, supra*, (236); *Watt v. Cecil*, 368 Ill. 510, 15 N. E. (2d) 292; *Lewis v. Niemann*, 293



Ill. App. 639, 12 N. E. (2d) 701; *Ogent v. Beasley*, 284 Ill. App. 363, 1 N. E. (2d) 725.

Finding reversible error in the record, the judgment of the Circuit Court of Logan County will be reversed and the cause remanded to said Court.

*Reversed and Remanded.*





PUBLISHED IN ABSTRACT

Helen M. Thomson, Plaintiff-Appellee, v. W. C. Miner,  
Defendant-Appellant.

Gen. No. 9208

303 I.A. 3351

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

An action at law of fraud and deceit was filed in the Circuit Court of McDonough County by Helen M. Thomson, plaintiff appellee, against the defendant appellant, W. C. Miner. The case was heard by the Court without a jury and resulted in a judgment in favor of the plaintiff for \$1,671.90, from which the defendant has appealed.

The complaint alleged in substance that the defendant, a representative of Wall Street Security Corporation, entered into negotiations with the plaintiff on or about December 31, 1934, for the purpose of having her deposit with said corporation one hundred shares of common stock of Swift & Company which had come to her from funds left to her by her father; that the defendant was familiar with the affairs and condition of the corporation and received compensation for his services; that as an inducement to her to so deposit her stock, he stated and represented to her that if she would deposit the stock with the corporation, said corporation would return and re-deliver said stock to her at any time upon giving fifteen days' notice to said corporation, "which statement was false, and known by the defendant to be false, or should have been known by him to have been false, or if he was ignorant of such fact, such representation should not have been made;" that the defendant exhibited to the plaintiff certain affidavits purporting to be from various insurance companies and financial concerns of the City of Chicago to the effect "that the said Wall Street Security Corporation was a sound corporation and that he did then represent it was entirely solvent and responsible for any and all of its undertakings;" that the plaintiff relying on the statement of the defendant, deposited one hundred shares of Swift and Company's stock of the par value of \$25.00 with the defendant, and that he accepted the same to be forwarded to the Wall Street Corporation upon the basis of the representations made by him and did forward said stock to said corporation, and that the plaintiff received from Wall Street Security Corporation a certificate reciting:





“The Wall Street Security Corporation hereby agrees to deliver to Helen M. Thomson, the securities listed below upon fifteen days’ notice:

100 shares Swift & Company capital stock.

Wall Street Security Corporation

By W. W. Porter (Signed),

President.

Dated Jan. 2, 1935.”

The complaint further alleges that instead of retaining said stock for her benefit, as represented by the defendant, said stock was sold by the Wall Street Security Corporation and possession given; that on or about February 15, 1935, she made demand on said corporation for the return of the stock and that the stock was never returned; that on December 31, 1934, the Wall Street Security Corporation was not solvent and responsible for its undertakings; that on May 1, 1935, it filed a petition in bankruptcy and was adjudged bankrupt that the fair cash market value of said stock of \$2,000.

A motion by defendant to strike the complaint in the nature of a demurrer was overruled. An answer was then filed denying all material allegations in the complaint that charge fraud on the part of the defendant, and admitting that a certain prospectus and affidavits were exhibited to the plaintiff, who examined them and relied thereon in making her contract with the Wall Street Security Corporation, if any was made, and also admitting that plaintiff deposited one hundred shares of common stock of Swift & Company with the corporation. The answer also pleaded as a separate defense that the plaintiff had filed her claim in bankruptcy in the sum of \$2,000 and had received thereon the sum of \$614.82, and that she had thereby elected to pursue her remedy against the Wall Street Security Corporation and released the defendant from any and all liability. Plaintiff replied thereto denying the matters set forth in the special defense.

The plaintiff’s evidence disclosed that she has lived in Macomb, Illinois, for several years, separate from her husband, who is incurably insane and is confined in a hospital; that she has known the defendant his entire life; that on December 15, 1934, she met him in Macomb, Illinois, and asked his opinion with reference to Swift & Company’s stock; that he stated that it was a strong stock and advised her to keep it; that in his conversation he further stated that he had a way to obtain more income on the stock and would like to



talk the matter over with her; that a few days later, he called at her office and told her that if she would give him the stock to deposit with the Wall Street Security Corporation, she would receive a return of six per cent interest above what she was then getting for the Swift & Company's stock; that the Wall Street Security Corporation was a very strong concern, backed by the Wall Street Trust Company of New York, which secured its financial standing and that the latter company would guarantee a return of stock within fifteen days. He later called upon the plaintiff with a number of affidavits and statements with reference to the soundness of the Company, many of which were written on letterheads, and a prospectus of the Company which were examined by her. The defendant and his wife had invested in excess of \$50,000 with the Wall Street Security Corporation, and suffered a loss on their investment in the same proportion that the plaintiff had.

The only allegations with reference to fraud on the part of the defendant are found in paragraphs five and ten of the complaint, to which defendant's motion to strike had been overruled. Paragraph Five alleges "that the defendant represented to the plaintiff that if she would deposite stock with the Wall Street Security Corporation, that said corporation would return and deliver said stock to her at any time upon giving fifteen days' notice to the corporation, which statement was false, and known by the defendant to be, or should have been known to him to be false, or if he was ignorant of such fact, such representation should not have been made."

Defendant assigned error in overruling his motion to dismiss the complaint and in denying motion to strike paragraphs five and eight thereof; in the admission and refusal to admit certain testimony; in denying defendant's motion to dismiss the complaint made at the close of plaintiff's evidence and failure to enter judgment in favor of the defendant at the close of all the evidence; in entering judgment in plaintiff's favor and in not finding that the plaintiff had elected an inconsistent remedy in tort following allowance of claim and credit thereon in the bankruptcy proceeding.

Upon review of the pleadings, evidence and rulings of the Court herein, it appears that the same sustains the contention of the defendant that the alleged false representation concerned a promise to do some act in



the future and not of a wilful and false representation of an existing or past fact, concerning which contention the respective parties have argued extensively and cited numerous authorities.

In Illinois, in order to state and recover damages in an action at law for fraud and deceit, the false representation relied upon, in order to constitute a cause of action, must be a representation as to an existing or past fact and not a mere promise to do some act in the future. A failure to comply with a future promise does not constitute fraud. The general rule is that to amount to fraud there must be a wilful, false representation as to an existing or past fact. *Brodsky v. Frank*, 342 Ill. 110, 118; 173 N. E. 775, and cases there cited.

In the case of *Wright v. Peabody Coal Company*, 290 Ill. App. 110, 115; 8 N. E. (2d) 68, this Court held that the essential elements of an action on the case for fraud and deceit are that the defendant made representations that were false; that they were known by the defendant to be false and made to deceive the plaintiff; that the plaintiff believed the representations; that the plaintiff reasonably relied on such representations and acted thereon to his damage or injury.

Furthermore, it is the settled law in this state that to constitute fraud at law, the representations must be an affirmation of fact and not a mere promise or expression of opinion or intention. *Keithley v. Mutual Life Ins. Co. of New York*, 271 Ill. 584, 111 N. E. 503; *Bielby v. Bielby*, 333 Ill. 478, 165 N. E. 231; *Wright v. Peabody Coal Co.*, *supra*.

Nowhere does it appear in the allegations of paragraphs five or eight or elsewhere in the complaint or proof herein that a false representation was made as to an existing or past fact as distinguished from a mere promise to do some act in the future. Failure to comply with a future promise does not constitute fraud. Whatever the purpose of the defendant may have been in promising the plaintiff that if she decided in the future that she desired the return of her stock, the company would, upon fifteen days' notice and demand therefor, return the same to her, such promise to do a future act and proof thereof would not state nor sustain a cause of action at law for fraud and deceit.

In an action at law for fraud and deceit, the rules of common law pleading, including representation, falsity, scienter, deception and injury, must be pleaded. *Johnston v. Shockey*, 335 Ill. 363, 167 N. E. 54.



The Trial Court erred in denying defendant's motion to strike the fifth and eighth paragraphs of the complaint, which motion should have been allowed. We further hold that the Trial Court erred in entering judgment in favor of the plaintiff upon the pleadings and evidence herein.

The judgment of the Circuit Court of McDonough County will therefore be reversed and the cause remanded with directions to proceed in accordance with the rulings herein.

*Reversed and Remanded.*





Filed Jan. 15 1940

abstract

PUBLISHED IN ABSTRACT

**First National Bank of Mt. Auburn, Illinois, Plaintiff-  
Appellee, v. School District No. 63 of Christian  
County, Illinois, Defendant-Appellant.**

Gen. No. 9200

303 I.A. 335<sup>2</sup>

Mr. JUSTICE FULTON delivered the opinion of the Court.

For a period of about two years prior to July 9, 1938, one R. J. Nier, had been engaged in selling School Playground equipment as the authorized dealer and representative of the Howell Playground Equipment Company of Danville, Illinois. On the above date he called upon the Directors of School District No. 63, Christian County, Illinois, and sold them certain playground equipment. The articles were to be delivered and installed by Nier before the beginning of the next school term. The order was made out upon the blanks furnished Nier by the Howell Company and recited that the directors of the school agreed to purchase of R. J. Nier "authorized dealer in the products of Howell Playground Equipment Company of Danville, Illinois" certain equipment designated in the order. The order was accepted by R. J. Nier, dealer.

After obtaining the order Nier went to Danville and called on B. L. Howell of the Danville concern who testified that Nier said he had the order but did not have the money to pay for it, and proposed to Howell that if the company would deliver the equipment Nier would accompany Howell to the school board and collect the amount due and pay the Howell Company for the same. Accordingly on August 22, 1938, the Howell Company placed the equipment on a truck and delivered the same upon the school grounds. On the evening of the same day Nier called upon John C. Sergeant, Clerk of the Board, and told him the equipment was on the school grounds but that he had to pay for it before it left Danville; that he was short of funds with which to pay the truckers and to obtain materials and labor for the installation of the equipment. He asked for payment promising to return the next morning and attend to the installation. The Clerk then prepared a regular school order payable to R. J. Nier for the sum of \$200.00, the price of the articles purchased.



signed the same and delivered it to Nier. The order introduced in evidence also bore the signature of George F. Lawrence, President of the School Board, and on its face stated the purpose for which it was drawn as follows: "New Equipment not attached to building. \$200.00". Early the next morning Nier presented the school order at the First National Bank of Mt. Auburn, Illinois, where he had many times cashed similar orders and the bank paid him the sum of \$200.00. The order was drawn on the First Trust and Savings Bank of Taylorville, Illinois. Later in the morning of August 23rd, 1938, Howell appeared on the scene and not being able to locate Nier, visited the bank, learned that the order had been cashed and then notified the school directors that the equipment did not belong to Nier, but to the Howell Company, and before the school order had cleared, payment was stopped. Nothing has been heard of Nier since that time, and the order has not been paid. The school directors made arrangements with Howell to leave the equipment on the school site and to install the same. It has since been used by the pupils of the school, and Howell was paid by the school directors. Thereafter the First National Bank of Mt Auburn started suit against the Board of Directors of School District No. 63 in Justice Court and secured a judgment for \$203.64, being the amount of the order plus protest fees. An appeal was taken to the Circuit Court of Christian County where judgment for the same amount was rendered in favor of the First National Bank of Mt. Auburn, from which judgment this appeal arises.

It is insisted by the Appellant School District that the Appellee Bank is merely an assignee of the payee in the order, Nier, and therefor stands in the same position as such payee, and has no greater rights than Nier would have in this same suit as plaintiff; that any defense that would be good as against Nier, is equally good against the bank as an assignee of the school order. This we concede to be a correct principal of law, *Newell v. School Directors*, 68 Ill. 515. *People ex rel v. Johnson*, 100 Ill. 537. However the defenses interposed in the Newell case are clearly distinguishable from the facts in the case at bar. In that case it was stipulated that the articles ordered by the School Directors had never been delivered, nor any part thereof and the Court held that the directors had no power to issue orders payable at a future date and there was an entire failure of consideration. It was



further held that the school order in question did not show on its face for what purpose it was drawn as required by statute and was void for that reason.

In the present case the School Directors dealt entirely with R. J. Nier and purchased the equipment from him as the authorized dealer in the products of the Howell Company. The equipment was delivered upon the school premises before Nier applied for payment. The order was issued to him direct and by him presented to the Appellee bank and cashed. Howell was not known in the transaction until all above facts had transpired. There is no proof of a failure of consideration. The equipment has been delivered, it has been installed and is being used. If there was some understanding between the Howell Company and Nier as to how the money should be collected and divided, that was no concern of the School Directors without some notice of a limitation upon the authority of the agent Nier.

"The law is well settled that a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give."

*Faber-Musser Co. v. Dee Clay Co.* 291 Ill. 240., and in the same case quoting from 2 Corpus Juris 573, the Court approved of the following rule:

"Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds his agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct would naturally suppose the agent to possess."

The Howell Company may have a just and valid claim against R. J. Nier, but the School Directors in our judgment have no valid defense against the claim of the Appellee Bank. The judgment of the Circuit Court is affirmed.

*Affirmed.*



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PUBLISHED IN ABSTRACT

Edith McCarthy, Plaintiff-Appellee, v. William Gray,  
Defendant-Appellant.

Gen. No. 9203

303 I.A. 336'

Mr. Justice FULTON delivered the opinion of the Court.

On the 5th day of August, 1937, the Defendant-Appellant William Gray, while driving his automobile in a westerly direction over and along State Route No. 10, and at its intersection with 19th Street, in the City of Hamilton, Illinois, struck the Plaintiff-Appellee Edith McCarthy, as a result of which the Appellee sustained severe personal injuries. This action was brought by the Appellee to recover damages for such injuries. A trial in the Circuit Court of Hancock County resulted in a verdict by a jury in the sum of \$3,800.00 in favor of Appellee, and upon which verdict judgment was entered by the Court. The appeal here is from that judgment.

The complaint consisted of one count and charged that the Appellant, William Gray, was driving a Ford V8 automobile in a westerly direction upon and along a public highway known as Route 10, where said road intersects 19th Street; that the Appellee was a pedestrian and was starting to cross the highway from the north side to her place of business at the southwest corner of said intersection; that she was at all times in the exercise of due care and caution for her own safety; that Appellant operated his automobile at a speed greater than was reasonable and proper, having no regard to the traffic in use of the highway so as to endanger the life and limb of other persons lawfully upon the highway; that he failed to keep a lookout for other persons lawfully upon the highway; that he failed to apply and use his brakes so as to stop his automobile and avoid striking the Appellee; that he failed to sound his horn and warn Appellee of his approach and that he failed to maintain a reasonably safe control over the movement and operation of his automobile. That he carelessly and negligently drove his automobile against the Appellee with great force and violence and thereby injured her.





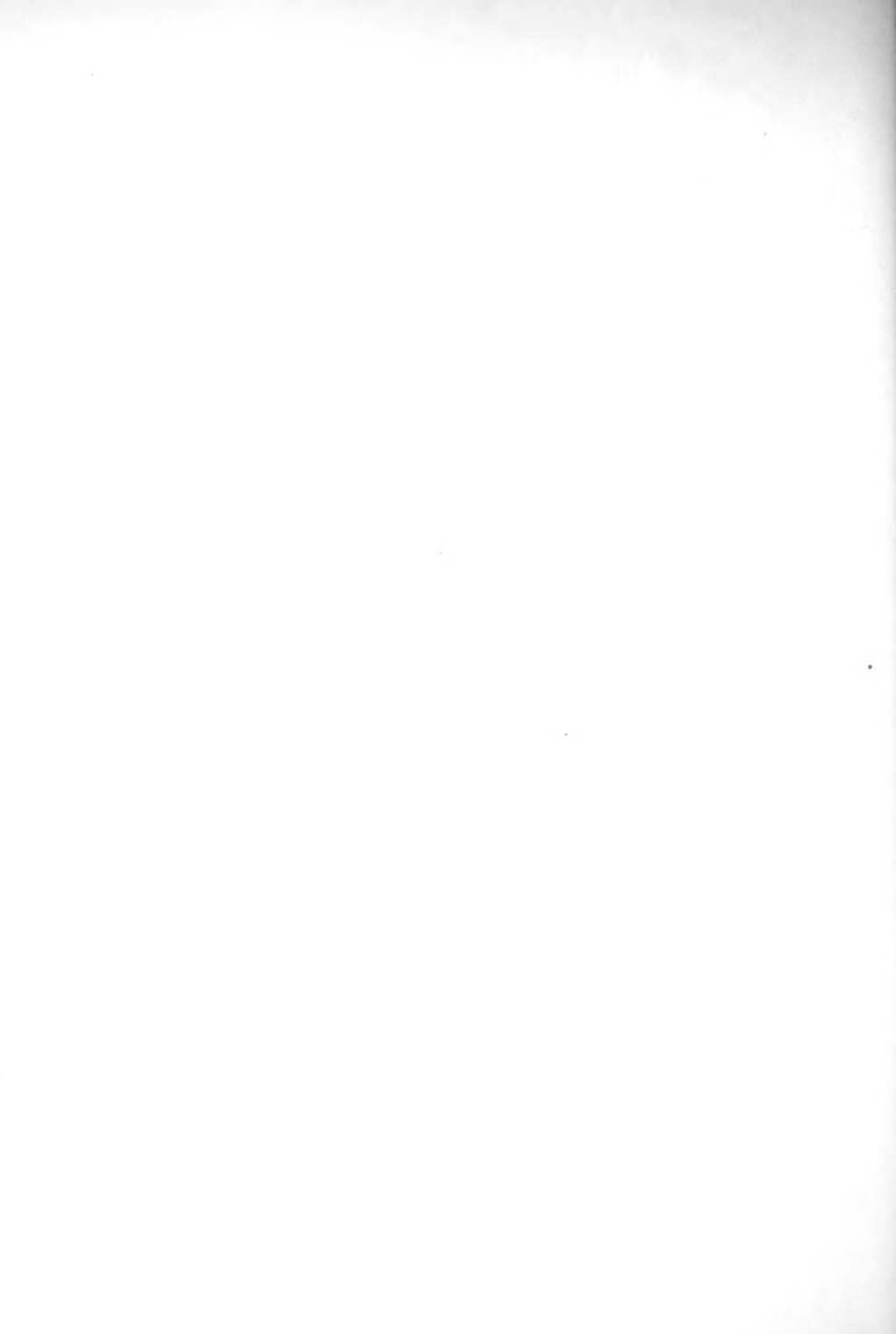
The Appellant is his answer admitted the ownership of the automobile, and that he was driving same but denied all other material allegations and charges contained in the Complaint.

It is admitted in the testimony that the accident took place about noon on August 5th, 1937; that the day was clear and the visibility good and that the pavement was dry. State Route 10 runs east and west through the City of Hamilton, is 66 feet wide with an 18 foot cement slab down its center. 19th Street is a well graveled road running North and South, is 66 feet wide and has a sidewalk on the east side thereof but no sidewalk on the west side of the street. The Appellee operated a grocery store at the southwest corner of the intersection of Route 10 with 19th Street. On the northwest corner of the intersection is located Berry's Service Station. At the northeast corner of the intersection is located what is known as Tom Holtsclaw's store. There is a "stop" sign about four feet west of the west line of 19th Street and on the North side of Route 10. Located 38½ feet east of the east line of 19th Street is a cottonwood tree about four feet in diameter and about 15.2 feet north of the north side of the slab on Route 10. The portion of the city east of this intersection was one of the built-up residence sections of Hamilton.

On the day of the accident the Appellee was returning to her store from the north side of Route 10. She had been to a mail box north of Holtsclaw's store on the east side of 19th Street. As she returned she went to the northwest corner of the intersection and proceeded south on the line where the crossing would have been if there had been a sidewalk. There was a car setting off the slab on the shoulder of Route 10 a foot or two and pretty close to the Cottonwood tree.

As the Appellee approached from the north she stopped when she was about three or four feet from the slab and looked east and west but saw nothing approaching. She stepped onto the slab and had taken two or three steps on the pavement when she heard the screeching of the brakes to Appellant's car and attempted to get out of the way but was struck somewhere near the stop sign and injured.

There was a road sign about 700 feet east of the intersection reading "30 M. P. H." The Appellant was driving his car at a speed of from 45 to 60 miles per hour and first saw Appellee when he was about 150 to 200 feet away from the spot where the accident occurred, and noticed she was approaching the slab.



When Appellant was distant about 75 feet and as Appellee stepped on the pavement he applied his brakes and swerved south but not far enough to avoid the accident. At the time of the impact his car was traveling somewhere from 8 to 30 miles per hour. Appellant did not sound his horn nor give any other warning of his approach. The sound of his brakes was heard for considerable distance away and tire marks showed on the pavement for a distance of more than 66 feet. The Appellee was thrown high in the air and landed on the north shoulder of Route 10 sustaining a compound comminuted fracture of the tibial bone of the right limb just above the ankle. She suffered other bruises and lacerations as well as an injury to her back. The extent of the injuries is not in controversy.

In seeking a reversal of the judgment in this case the Appellant urges two main reasons, one that the record shows the Appellee did not exercise due care for her own safety and the other that the Court erred in refusing certain instructions offered on the part of the Appellant. It is the theory of the Appellant that August 5th was a clear day; that the Appellee had good eyesight and when she looked east along Route 10 before stepping on to the pavement, by using her faculties to avoid injury, she should have seen the approaching car; that to say she looked and did not see was not sufficient excuse to relieve her of the duty to exercise due care; Appellant also insists that when she did see the car she had ample time if she had exercised due care to get out of the way. Our Courts have uniformly held that the question of contributory negligence is one which is pre-eminently a fact for the consideration of the jury. *Blumb v. Getz*, 366 Ill. 273.

In that case the Court said that it was not negligence per se for a pedestrian to be upon the highway, and further "As a matter of common knowledge, pedestrians upon highways running through the country use, and have a right to use, such highways, as well as the autoist, and both hold a mutual obligation each to the other, to observe their reciprocal rights." In the present case the negligence of the Appellant is practically conceded. According to his own testimony he was travelling at the rate of 45 miles per hour when he first saw Appellee approaching the pavement and while he was 200 feet away; that when she stepped about two steps on the pavement he was 75 feet away and applied his brakes. That he swerved and tried to avoid striking Appellee but could not do so; that he



was travelling about 15 miles per hour at the time of the impact. The evidence of the other witnesses proved conclusively that he did not sound his horn or give any other warning of his approach. Even if the Appellee had seen the car of Appellant 200 feet away just as she was stepping on to the pavement, the jury might well take into consideration in its deliberation the fact, if it was a fact, that if Appellant has observed the speed and safety laws of the State of Illinois she would have had ample opportunity with safety to cross the highway in apt time before Appellant's car reached the west side of 19th Street. In addition the jury had a perfect right to determine as a question of fact whether the cottonwood tree four feet in diameter and the automobile standing between the tree and the edge of the pavement in any manner obscured her view. In *Thomas v. Buchanan*, 357 Ill. 270 the Court held that the question of due care on the part of a plaintiff is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the plaintiff. In *Gannon v. Kiel*, 252 App. 550, the Court said on page 558:

"Her care or want of care was for the jury to determine under all the surrounding circumstances that existed at and prior to her injury. The proof tends to show that she looked before crossing the street, and could not be held to be bound to anticipate that defendant's car would approach at such rapid speed without giving her due warning."

Under the circumstances surrounding the accident in this case we do not believe it can be said that the conduct of the Appellee constituted contributory negligence as a matter of law.

Appellant complains particularly of the refusal of the trial Court to give two instructions offered by the defendant. Instruction No. 2 which was refused embodied the principle of law that if Appellee had an unobstructed view of the car of Appellant approaching her from the east, that she could not rely upon the assumption that there would not be a violation of the statutory duty of the driver of the car with reference to speed, sounding the horn or other statutory requirement, but that she must use such care and caution to avoid injury as a reasonable and cautious person would have used, and if she did not do so, then she could not recover. It is sufficient answer to say that in all the



Appellant tendered 37 instructions to the Court, 23 of which were given. Sixteen of those instructions embodied the question of due care or contributory negligence on the part of the Appellee and the jury were well and fully instructed upon those principles of law.

Further objection was made to the refusal of instruction No. 4 tendered by Appellant. This instruction contained a definition of contributory negligence and coupled with it a definition of the word "proximately". As this word and the term "proximate cause" was used frequently in the instructions an independent instruction containing an accurate definition of those terms would have been helpful but involved as it was with particular reference to the instruction on contributory negligence which was covered in many other instructions, we do not consider the Court erred in refusing No. 4. The Appellee offered 11 instructions all of which were given and do not seem to be criticized. On the whole series it is the opinion of this Court that no substantial error was committed by the Court in refusing the instructions about which complaint was made.

In our opinion the record in this case sustains the judgment of the Circuit Court and it is therefore affirmed.

*Affirmed.*





PUBLISHED IN ABSTRACT

Frank Altman, Plaintiff-Appellee, v. A. B. Bliss, Defendant-Appellant.

Gen. No. 9179

303 I.A. 336<sup>2</sup>

Mr. Justice HAYES delivered the opinion of the Court.

This is an appeal in the Circuit Court of Logan County, Illinois, from a judgment in favor of the plaintiff (appellee) Frank Altman, against the defendant (appellant) A. B. Bliss for the sum of two thousand five hundred forty five and 65/100 (\$2,545.65) dollars, and the costs of the suit.

The complaint alleged that, on the 23rd day of May, 1935, defendant entered into a verbal agreement with the plaintiff; hired the plaintiff as crane-man in sinking a coal mine in Logan County, and agreed to pay the plaintiff the sum of \$1.08 per hour. Complaint also alleged performance by the plaintiff, and set forth the sum of 3,619½ hours as the total time plaintiff worked for defendant.

The defendant, by his answer, denied that he entered into a verbal or any other contract of employment with the plaintiff as engineer and crane-man, and denied that he agreed to pay the plaintiff \$1.08 an hour for labor.

It appears from the record, that for many years prior to 1931, there had been three coal mines operated in the City of Lincoln, which gave employment to many coal miners. The last of these mines was closed about 1931, throwing the miners out of employment. In the Spring of 1935 a movement was instituted by the defendant, A. B. Bliss, with the cooperation of the Chamber of Commerce of the City of Lincoln, and the Union of the Progressive Miners of America in Lincoln, to sink a shaft for a new coal mine about two miles west of the city.

Bliss entered into a verbal agreement with Local 93 of the Progressive Miners of Illinois, located at Lincoln, Illinois, whereby said local furnished certain of its members to do the work in sinking the mine at the regular union wage scale, payment to be made, however, for such work, in stock of the company sinking said mine, until the mine should be completed and coal should be reached. The plaintiff Frank Altman, had



for many years been a coal miner in the City of Lincoln, and had been a former member of a Union of the United Mine Workers, but had lost his membership in said Union, and at the time of his starting to work for Bliss was not a member of any union.

On or about May 22, 1935, Bliss and Altman, in the presence of the witness Simpson, had a conversation in regard to Bliss employing Altman to operate the crane in opening the shaft. There is a sharp conflict in the evidence as to the substance of this conversation, it being contended by the plaintiff Altman that Bliss agreed to pay him the regular union wage scale for cranemen, although no exact figure was mentioned by the parties. The defendant Bliss, on the contrary, contends that he told Altman there would be no money, but if he wanted to go along as the other miners were doing, he could go out and go to work.

Plaintiff's case is based on an expressed contract for \$1.08 an hour as set up in the complaint. The record discloses that the proofs to sustain this averment are meager, indefinite and uncertain, there being the plaintiff, defendant and another witness present at the time the conversation took place. Upon examination of the testimony of the plaintiff the following appears:

Q. Just go ahead and tell the Court, Mr. Altman, what conversation took place there between you and Mr. Bliss, or in Mr. Bliss' presence, if you cannot give the exact wording give the substance of the conversation?

A. He said he was wanting a crane operator; wanted to know if I would come out and operate his crane for him.

Q. What did you say in reply to that?

A. Well, I told him that I would, that I didn't belong to the Union, I probably would have to get back into the Union and asked him if he would pay the Union scale.

Q. What did he say in response to that?

A. He said he could not aggravate trouble by not paying the Union scale; that he was signed up by the Union.

Q. Was any specified amount mentioned at the time, per day, per month or per hour?

A. No, he just said the scale.

In reference to this same conversation, the defendant Bliss testified:

Q. Give the circumstances under which you talked to Mr. Altman on that day?



A. Well, I told Mr. Altman that I wanted him to come out to run our crane and also told him that the Union would not require that he belong to the Union. I also told him there would be no money, if he wanted to come along as the other miners were doing, why, he could come out and run the crane.

The only other witness who testified to this conversation was Jerry Simpson. The following appears from Simpson's testimony:

Q. Go ahead; tell the conversation that took place at that time.

A. He was telling him he needed a Clam Operator; before that I had told Mr. Bliss myself about him; he went by to see him, to get him to go out. "Copley", that is Mr. Altman, asked him if he had to belong to the Union.

Q. He asked what?

A. He asked if he was organized and they paid the Union scale and he knows he would have to join the union.

Q. What else did he say?

A. He said he was affiliated with Local 93, Progressive Miners, and he wanted everything Union, is the way he spoke, he didn't want no trouble between Union and Labor.

Q. Was anything said there in your presence, by either of them, about Mr. Altman taking any stock?

A. None whatever at that time.

Q. Was anything said by either of them about whether or not he would or would not pay the union scale?

A. Nothing that I can remember that evening, other than I have spoken.

The most favorable construction that can be placed upon plaintiff's own testimony is that the defendant, when asked at the time of hiring Mr. Altman whether or not he would pay the union scale, replied that he had signed up with the union.

It appears that the mine in question was to be a shaft mine rather than a strip mine. It further appears that the wage agreement between the Progressive Union, and the Coal Operators does not provide for the scale of clam-shell operators in a shaft mine, for the reason that this type machinery is not used in shaft mining, being used only in strip mining, where the dirt is removed from the surface and the coal mined in the open. The scale for clam-shell operators in strip mining was introduced in evidence showing the scale in May, 1935



—at the time of the hiring—and up until October 1, 1935, to be \$6.38 for an eight-hour day, or 79¾ cents per hour rather than \$1.08 an hour.

The plaintiff went to work in May, 1935, at the mine in question, and continued working there until about the first of December, 1936. From the time he commenced work he neither asked nor received any pay from the defendant, until the month of December, 1935. When he started to work at the mine, he was working on relief also, and worked more or less irregularly until the latter part of August, 1935. After August, 1935, he worked regularly, running the crane when the same was in use and needed, and doing various other kinds of work, as well as acting as watchman. He received no money up until December 16, 1935, at which date he went to Bliss and said he had been cut down on relief and that he wanted some cash as he went along. Bliss asked him if \$5.00 a week would do, and he said that was all right unless he was further cut on relief. On that day, Bliss paid him \$8.00 and made various payments from that time until March 23, 1937. It further appears from the record that plaintiff had a talk with some of the members of the union, relative to his admission therein, but that he did not join the union.

Joseph Lorman, Chairman of the Miners' Committee, testified that Altman told him many times that he was not getting any money 'out there'; that he was helping sink the shaft so he would have a job when they hit coal, the same as the rest of the miners. Lorman further testified that Altman told him he wanted to get into the local so he would have the protection of the union in his job, and Lorman told Altman he would have to make application. Lorman's testimony is, "I told him after the next meeting that his application had been rejected." Willoughby, the Secretary of the Mining Company, testified that Altman told him that he did not intend to charge Mr. Bliss the union scale; that he intended to stick with him until the mine was down and expected to take his pay in stock.

There is evidence in the record that on at least two occasions the plaintiff had an opportunity to take another job, but was persuaded by the defendant Bliss not to accept the same, who represented there would be ample money to pay him, so the plaintiff refused the other work and continued to work for the defendant.

An impartial review of the whole record tends to show that in the fore part of the employment, plaintiff had in mind to join the union; go along with the other





miners to help get the shaft down to the coal, and take his pay in stock so that he would have a job when the mine started operating. During this period he only worked the days he could not work on relief. It then appears that the union rejected him; the relief cut his allowance, and he insisted that Bliss should pay some money as he went along,—which Bliss did.

There is no evidence in the record supporting an expressed agreement on price, as alleged in the complaint, of \$1.08 an hour. Not only is the manifest weight of the evidence against this, but the evidence in support of it is wholly lacking. While it is true that plaintiff was hired by the defendant and worked for him, the price was not agreed upon in expressed terms. As to the rate of wages, under the record as made, we are forced to find that there was no express agreement; no meeting of minds, and the plaintiff is left to recover on an implied rather than an expressed contract,—there being no proofs made of what the reasonable and customary wage was.

“It is a fundamental rule, with no exceptions, that a party must recover, if at all, on and according to the case he has made for himself by his pleadings. He cannot make one case by his averments, and have judgment on another and different ground, even though the latter is established by the proof.” *Foranoff v. Smith*, 281 Ill. App. 232, 236.

“It is unnecessary to cite authorities to the effect that a plaintiff who fails to prove the cause of action alleged in the declaration cannot recover, although he may prove another and different cause of action. In such case it is not only a variance but it is also a failure of proof.” *Hauer v. Sampsell*, 153 Ill. App. 66, 70.

For the reasons herein set out, the judgment of the Circuit Court of Logan County is reversed and the case is remanded to said court.

*Reversed and Remanded.*



Filed - Jan. 15, 1940

Abstract

PUBLISHED IN ABSTRACT

Faye Beard, Plaintiff-Appellee, v. Otto Zindars, Defendant-Appellant.

Gen. No. 9197

303 I.A. 337

MR. JUSTICE HAYES delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court of Piatt County, in favor of Faye Beard, appellee, hereinafter called plaintiff, against Otto Zindars, appellant, hereinafter called defendant, for personal injuries sustained by the plaintiff in an automobile accident. The case was tried by the court without a jury.

The plaintiff was injured while riding in an automobile owned and driven by Lloyd Roy. In addition to Roy and the plaintiff there were two other women and one man riding in the car at the time of the accident. All of them were employed by the Illinois-Iowa Power Company at Champaign. They had procured some lunch and were on their way to a picnic after working hours. The site of the accident was at the intersection of state route forty-seven,—which runs between Champaign and Monticello, Illinois, in an easterly and westerly direction,—with a graveled road that runs north and south on the County Line between Champaign and Piatt Counties. The accident occurred about six o'clock P. M. on June 2, 1937. The sun was shining, and it was a clear day. The plaintiff sat in the rear of the car on the right side, and Mr. and Mrs. Schrock sat with her. Mary Fortney sat on the right-hand side in the front seat of the car, with the driver Mr. Roy. The defendant was traveling in his automobile in a westerly direction, approaching the above mentioned intersection. The Roy car was traveling in the same direction as Defendant's car and was slightly in the rear. The defendant had knowledge of the Roy car following him as he testified that he looked through the mirror and could see the Roy car about five hundred feet back of him. The record shows Zindars was traveling at a rate of speed of about thirty miles per hour, and as he came up to the intersection in question, he reduced his speed to fifteen miles per hour. The record also shows that the Roy car was traveling between fifty and sixty miles per hour.



Roy and Mrs. Schrock testified that the defendant extended his left hand out of the car at the same time that he turned left. Defendant testified,

"I held my hand out just before I came to the bridge. I slowed down to make my turn because it is a pretty sharp turn. When I made the turn, I heard the crash."

The bridge that he speaks of is a culvert under the concrete slab on route 47, one hundred twenty seven and one half ( $127\frac{1}{2}$ ) feet east of the County Line. The improved portion of the gravel road going south on the County Line from this intersection is only nineteen feet wide, and on the east line of the intersection on each side of the gravel is a concrete headwall three feet wide and two feet high. The distance between these two headwalls is twenty six feet, so that a car traveling in a westerly direction with a desire to turn south on the County Line road has a sharp turn to make because of the narrow gravel road at this point. The state road runs due east and west at this place and is level for about three-quarters of a mile east of said intersection. There are deep ditches close to the fence on each side of the state highway, at this intersection. On each side of the state pavement on the County Line road, there is the regulation stop sign, marking a state road, requiring any vehicle coming on the state road from either direction off the County Line road to stop. The Illinois Central Railroad runs parallel with state route 47 at this point and is seven hundred ninety-two (792) feet south of the pavement.

The defendant was seventy-two years of age and was driving a 1930 Tudor Chevrolet Sedan, and had driven a car since 1916. Lloyd Roy was driving a 1935 Chevrolet Sedan, with mechanical four wheel brakes. Roy testified that at a hundred yards from the intersection, he sounded his horn and pulled over to the left side of the pavement with the intention of passing the defendant, who was then on the right lane. Roy continued to drive on the left-hand side to the intersection. When he got within thirty feet of Zindar's car, the defendant 'turned to the left just as he got on top of it.' The Zindar car was five or eight feet from the intersection when it turned to the left. Roy further testified that Zindar held out his hand as he made the turn; that he had not observed any signals from Zindar's before that; that he (Roy) turned his car as far to the right as he could, put on his brakes and missed hitting



Zindars; that his car went off the pavement to the northwest; that he tried to get it back on the pavement, but the back end of the car swerved towards the north, making the car face southwest; that he went into the ditch, rolled over twice and then hit the fence.

A farmer by the name of Oakley, who lived in the vicinity, testified that at the time of the accident he was a quarter of a mile away; that he heard the squeaking of brakes and immediately looked down the road, and that he saw one of the cars on the west side of the bridge and one on the east side. This would be a point more than one hundred feet east of the intersection. A number of witnesses testified that the tracks of the tires were plainly visible on the pavement and shoulder, made by the Roy car, which was evidence of a severe application of the brakes. Despite the commotion and noise caused by an automobile going off the road into the ditch and turning over twice, the defendant, totally unaware of all this, traveled over seven hundred feet, before he discovered there had been an accident, which shows he was not alert at the time, and explains his not hearing the signal from the Roy car, testified to by a number of witnesses. Considering the facts that defendant was on a state concrete road where the usual rate of travel is fifty miles per hour; where the state route has the right-of-way over intersecting highways; where a person is required, before turning from a direct course, to first ascertain that he can make the turn with reasonable safety,—and then only after giving an audible signal in ample time; where defendant had notice of a car approaching him from the east, there is but one reasonable deduction to make,—that he was guilty of negligence as found by the Trial Court.

Although there is a conflict as to when defendant put out his hand in reference to turning left, the weight of the evidence is to the effect that he did so simultaneously with turning left, and within a few feet of the intersection, and at a time too late for the other car to turn back to the right-hand side of the road without turning over.

Defendant contends that Lloyd Roy, the driver of the car in which plaintiff was riding, was guilty of negligence in passing another car within one hundred feet of an intersection; and that this negligence should be imputed to the plaintiff and bar her recovery on the ground that the plaintiff and the driver of the car were engaged in a joint enterprise,—namely going to a picnic. The record does not show facts that would





constitute a relationship, between plaintiff and Roy, of either master and servant or of principal and agent. The plaintiff was merely a passenger in the Roy car, and as far as the evidence discloses had no control over Roy in his operation of the same. The proximate cause of the accident was the sudden turning to the left by the defendant, without giving a signal, in ample time, of his intention so to do. The evidence discloses that Roy acted with promptitude as soon as it became apparent that defendant was changing his course. There is nothing plaintiff could have done at that time, that would have improved or changed the situation any, and her failure to make an outcry or any other demonstration is not material as affecting the result.

The Court said, in *Greene v. Citro*, 298 Ill. App. 25:

“As we said in *Schultz v. Live Stock Nat. Bank*, 278 Ill. App. 623 (Abst.), quoting in part from *St. Clair Nat. Bank v. Monaghan*, 256 Ill. App. 471, “if a guest were required at street intersections to look out and warn the driver of approaching cars, ‘a most uncomfortable and hazardous position might be created for the driver of a car who happened to have several passengers as guests.’ If all the passenger-quests should constantly be warning and directing the driver how to proceed he would be so distracted as to be unable to drive the car carefully. Back seat driving should not be encouraged.”

The defendant contends that the plaintiff was guilty of contributory negligence in that she was familiar with this hard road and its intersection with the County Line road, and she also understood that when Roy pulled out to the left lane, he did so with the intention of passing the defendant within one hundred feet of the intersection, to which plaintiff made no objection.

Up to the time the defendant actually crossed the black line, the plaintiff was not in as good a position, from where she sat in the back seat, to see the signal from the car ahead as the driver was. Defendant cites the case of *Dee v. City of Peru*, 343 Ill. 36. Dee, who was a passenger, was riding in the same seat with the driver of an automobile, and they came up to the approach to a bridge across the Illinois River, at a time when one of the spans of the bridge was open. It was broad daylight, and each had an equal opportunity to see the open span by merely looking. The driver of the car testified that he did not see the open span. Dee was drowned in the river. There was no evidence



in the record that Dee had said anything to the driver, or had discovered the open span. The Court held, under these circumstances, there was contributory negligence so as to bar recovery. The case at bar, however, can readily be distinguished from the Dee case, for in this case the driver of the car observed the defendant's car turning to the left the instant it started to turn, and there is nothing plaintiff could have done or said that would have aided the driver in avoiding the accident.

The Court below in his opinion very aptly stated:

"The law does require due care and ordinary caution upon the part of the passenger, such as should be used and exercised by ordinarily prudent men and women. The law does require upon the part of the passenger that if they are approaching a place of imminent danger, or if the driver is apparently about to do a dangerous act or take a dangerous chance, then it is required that the passenger should as a matter of precaution of his own safety warn the driver and do all in the power of the passenger to persuade the driver to desist from his careless or reckless course of conduct. This includes such matters as crossing a railroad crossing at high speed, or when a train is approaching, disregarding danger signals, or driving in and out of traffic at a high rate of speed, or any other conduct which is in itself fraught with danger and hazard. The facts in this record do not present such a case. The driver of the car in which the Plaintiff was a passenger was apparently driving at a reasonable rate of speed. The Plaintiff and the other passengers were visiting together. The day was bright and sunshiny and the road was absolutely dry and safe. The passenger is not required to watch every car that passes nor to take note of or warn as to those ordinary and usual things in the handling of the car which are not ordinarily thought of as hazardous or dangerous in any way. This Court, therefore, holds that the preponderance of the evidence in this case shows that the plaintiff was in the use and exercise of ordinary care for her own safety."

We agree with the findings of the Trial Court, and in accordance therewith, we hereby affirm the judgment of the Circuit Court of Piatt County.

*Judgment Affirmed.*



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

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Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

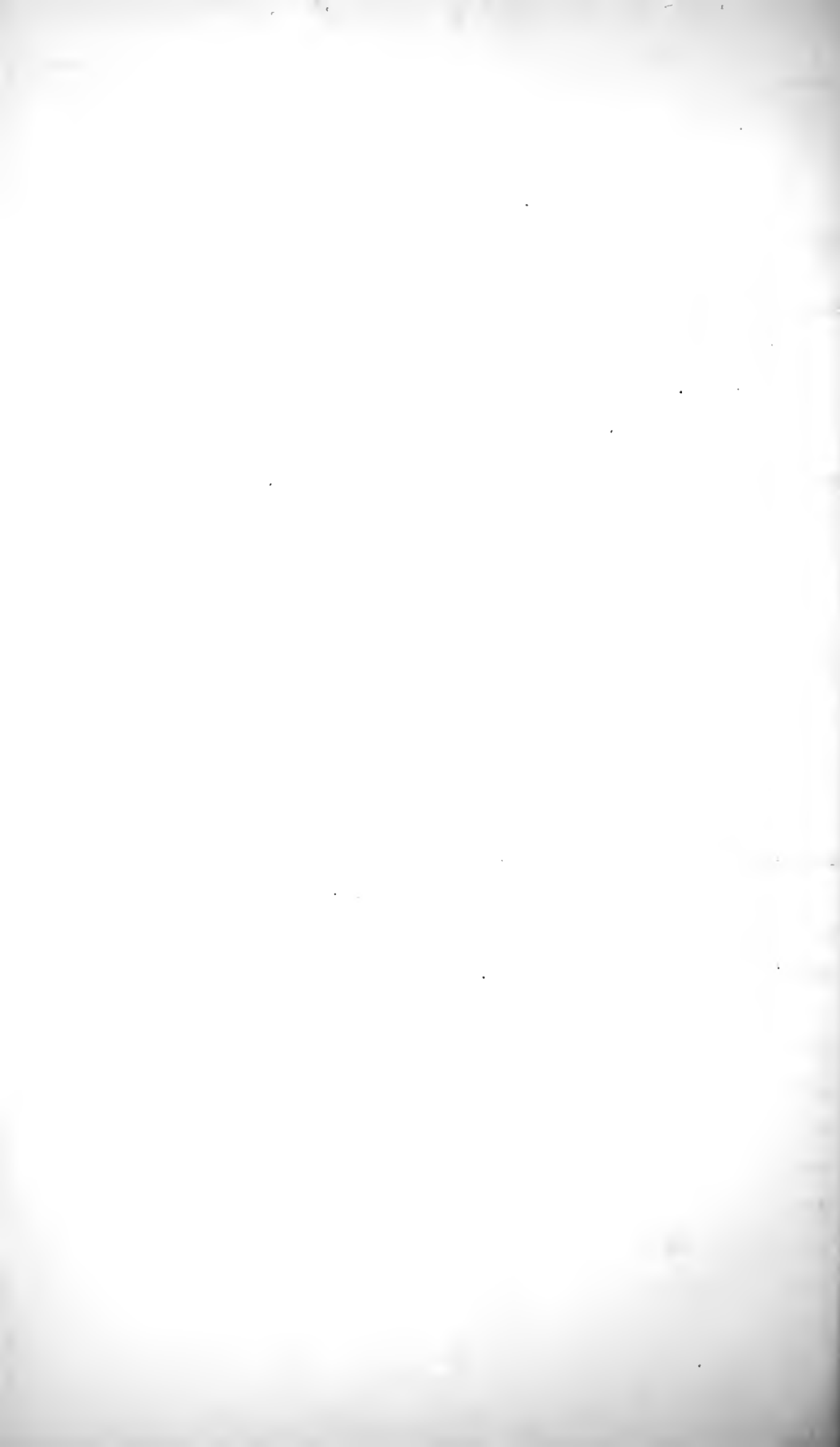
Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A. D. 1939.

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Appellee,

v.

ONE SLOT MACHINE FOUND IN PARK-  
SIDE RECREATION PARLOR and JOHN  
DOCHKUS, Owner,

Appellant.

APPEAL FROM THE COUNTY

COURT OF WINNEBAGO COUNTY

DOVE, J.

On March 17, 1939, William C. Bell, Sheriff of Winnebago County, went into the place of business of John Dochkus and took therefrom a machine manufactured by Exhibit Supply Company of Chicago, bearing labels to the effect that it was to be used for amusement only and for test of skill; that five balls may be played for five cents; that the score was expressed in points; that there was no pay off of any kind and no till; that no rewards or prizes were allowed and that it was not a ticket vending device. Thereafter the Sheriff filed in the County Court a petition alleging that he had seized "a certain machine which was per se a gambling device and which was used and could be used for gambling purposes and commonly known as a Pin Ball Machine and upon the result of the action of which machine money or other valuable thing

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could be staked, bet, hazarded or lost". The prayer of the petition was that the person in whose possession the machine was found be required to show cause why an order should not be entered directing that the machine be destroyed. The respondent John Dochkus filed an answer in which he set forth that he was the owner of the machine, denied that the machine is a gambling device per se and prayed for an order directing that the machine be returned to him.

A hearing was had and the only witness who testified was the sheriff. After stating that he went to #5513 North Second Street in Rockford on March 17, 1939 and took therefrom a machine labeled as above, his testimony as abstracted follows: "This machine has been played here today in the court room. It is made of wood frame, stands three and a half feet from the floor, wood legs, body about ten inches deep covered with glass. Operated by electricity, score being indicated on back board by illumination depending on action of balls against bumpers, of which there are eighteen of differing colors. There are three rows of figures, from eleven thousand to twenty thousand inclusive, and above them are numbers one thousand to tenthousand. The glass back board is illuminated by the action of the ball striking the bumpers. The playing score indicates twenty-thousand and two-hundred described as Lightning skill score. Ten thousand indicates two points and nineteen thousand, twenty points. There appears the words 'Notice--this machine for amusement only--no rewards or prizes allowed for skill score.' I played the machine myself and in my opinion I did not have control of the ball after it left the plunger, and I would not be able to tell which bumper would be hit after releasing the plunger. It is not possible for me to judge the pressure of the plunger enough to control the ball. When I played the machine I did not get my nickel back or any repayment for my investment."



The abstract of the record further discloses that upon the hearing the State's Attorney made the following statement to the Court: "In connection with this case there is no testimony that anyone played the machine at the Parkside Recreation Parlor where it was, to find out how the player gets his free games if he runs the score up to ten thousand. Apparently the machine itself provides no method by which additional plays could be given here in the court room. To play it further it would be necessary to add more nickels out of my pocket. The operation evidently depends upon its being in the presence of a proprietor".

At the conclusion of the hearing in the County Court, an order was entered finding that this machine was a "device upon the action of which money is staked, bet, hazarded, won or lost" and declaring the machine to be a gambling device and subject to seizure and destruction and ordering the sheriff to destroy it. From this order John Dochkus brings the record to this court for review.

Section 342 of Chap. 38 Ill. Rev. Stat. provides: "Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found". The question presented by this record is whether this machine is a gambling device as defined by this statute. The evidence discloses that it is a device for the reception of money but there is no showing that the money is received by the



machine on chance or that upon the action of the device money is staked, hazarded, bet, won or lost. As said in *Question Game Co. v. Ploner*, 273 Ill. App. 137, there is no evidence in the record as to just how this machine might be operated for gambling purposes. Undoubtedly it could be but if so it was incumbent upon the People to prove that fact. All that the record discloses is that it was in appellant's place of business. There is no evidence that anyone ever played it or what, if anything, the operator received in return for the nickel he placed in the machine except the right to operate the plunger. By so doing he might test his skill or manual control but the allegation of the petition to the effect that the machine was used for gambling purposes was not sustained by the evidence. The only allegation of the petition which was sustained by the proof is that the machine could be used for gambling purposes but upon the hearing the State's Attorney advised the court that there was no evidence that anyone ever played the machine in order to test his skill, or for pleasure, or to gamble or for any purpose whatever.

If this machine was a gaming device it was subject to the seized and destroyed. It is not the name of the machine or the labels that appeared thereon which determines its character but that is determined by the manner and result of its operation. *Mackay v. State*, an Oklahoma case reported in 83 Pac. (2nd) 611. In *Steed v. State*, an Arkansas case reported in 72 S. W. (2nd) 542 the evidence disclosed that the machines ~~six~~ seized were so constructed that by putting a nickel in a slot, ten marbles were released and brought into play one at a time by pulling a lever and then by pulling another lever each marble is shot out to a large board containing holes which



are numbered into which the marbles drop and that the patron who gets the largest score wins the game and the prize. The court held that because it appeared that the only reasonable and profitable use to which they might be put was use in a game of chance, they were in fact gambling devices within the meaning of the code provisions of that state. In the instant case how the operator can win does not appear nor does it appear that anyone can win or lose anything or how he can win a game or a prize.

In the state of this record we are constrained to hold that the order appealed from cannot be sustained. It is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

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STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



7781  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 238'

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELDER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A. D. 1939.

PENROSE ELEVATOR COMPANY,

Appellee,

vs.

WAYNE MCGRAY,

Appellee

and

W. F. HOLMES,

Appellant.)

APPEAL FROM THE CIRCUIT  
COURT OF LEE COUNTY.

DOVE, J.

On December 11, 1925 Elizabeth B. Eggers died intestate, leaving her surviving her husband John Eggers and two children Phyllis Eggers and John F. Eggers, Jr. At the time of her death she owned certain real estate in Lee County, including an eighty acre tract upon which she and her husband resided. On August 28, 1931 her surviving husband conveyed his interest therein to his children Phyllis and John Jr., reserving a life estate to himself. This deed was recorded the following day. The improvements consisted of a house, barn and corn crib and John Eggers was living thereon at the time this cause was heard and had lived there for many years. On August 29, 1932 the First National Bank of Compton recovered a judgment against John Eggers, Sr. for \$3743.14 and execution was issued thereon. Subsequently in 1933 the bank

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went into receivership and on January 24, 1938 the receiver sold this judgment to W. F. Holmes, who had an execution issued thereon on December 8, 1938 and the sheriff levied the same upon a crib of corn which contained corn raised upon this land during the crop years 1937 and 1938. The corn was advertised and on January 9, 1939 sold to Holmes at the execution sale for five cents a bushel.

Wayne McCray is a school teacher, thirty years old, and the husband of Phyllis Eggers and on August 31, 1934 John Eggers, Sr., the life tenant, entered into a written lease with McCray by the provisions of which Eggers rented this eighty acres to McCray for five years from March 1, 1935 to March 1, 1940 for an annual cash rent of \$100.00 payable October first each year, together with three triple box loads of shelled corn to be delivered the lessor each year. This lease was never recorded. After the sheriff's sale on January 9, 1939 of the corn to Holmes, the corn remained in the crib on the Egger's farm until January 12th, when McCray had it shelled and delivered it to the Penrose Elevator Company at Welland at an agreed price of forty-five and one-half cents per bushel. After the corn was delivered but before it was paid for, Holmes notified the elevator company that he was the owner of the corn and thereafter this complaint in interpleader was filed by the Elevator Company. McCray and Holmes entered their respective appearances, filed answers and counter-claims and upon a hearing the Chancellor found that McCray was the owner of the corn and entitled to the proceeds from the sale thereof, amounting to \$1475.73, and it is from this decree that W. F. Holmes has appealed.

The evidence discloses that shortly after the execution of the lease to McCray in August, 1934, McCray purchased a tractor and





plow and that ~~fall~~ ploughed forty acres. The next year he bought a team of horses and during 1935, 1936, 1937 and 1938 he farmed the work land on this eighty acres. While he was teaching he worked there Saturdays, Sundays and holidays and in the summer he and his wife made their home with Adolph Grinka, who lived eighty rods north of the Eggers land, and operated the farm. He was assisted at times by his father Frank McCray and also by his father-in-law John Eggers, whom the evidence shows did very little work. In 1935 McCray was a member of a threshing ring and assisted in the entire run. In that year and in the following year he sold the crops which were raised on the farm to the Penrose Elevator Company and to the Pasco Mill Products Company at Mendota. We have read the evidence of Marvin Schlesinger, the manager of the Elevator Company, John C. Zimmerman, Wilbur Zink, John Aiken, Adolph Grinka, Frank McCray, Levi Mahlbrech, John Florschuetz, George Schnuckel and the other witnesses who testified in this case and from their evidence it appears that appellee went into possession of all the tillable land on this farm in the ~~fall~~ of 1934 after the execution of the lease, operated the farm and continued so to do up to the time this case was heard in the court below. He purchased machinery, horses and seed, did much of the work himself, hired help and paid therefor, sold the crops raised and received the proceeds thereof, made and filed with the tax assessor a schedule of the grain and personal property located on this farm and included therein the corn in this crib raised in 1937. The assessor testified that in 1937 and 1938 he assessed the grain and other personal property on this farm to McCray and from a consideration of all the evidence we are unable to say the trial court was not warranted in its findings or judgment.



Counsel for appellant concede that the lease as between McCray and Eggers is valid and that as between these two parties the proceeds from the sale of the corn belong to McCray, but counsel argue that inasmuch as the lease was not recorded and because McCray was not in exclusive possession of the premises, Holmes, as a judgment creditor of Eggers, had no notice, actual or constructive, of McCray's rights and this corn must be held to be the property of Eggers, the life tenant, and subject to levy and sale under appellant's execution. Counsel insist that as to Holmes this corn while growing was the property of John Eggers and that the act of McCray in severing it from the ground and cribbing it after it had matured did not change the ownership so far as Holmes was concerned.

The lease under which McCray farmed this land was not recorded and McCray was not in the exclusive possession of the premises upon which this corn was raised but the evidence is that McCray planted, raised and harvested this corn. As to everyone except appellant it was clearly his property. When the execution was issued on December 8, 1938 the corn had been severed from the land upon which it was grown and was in a crib. It was appellee's personal property and was not subject to levy under appellant's execution against Eggers. Appellee neither said nor did anything to mislead appellant or to induce him to act to his prejudice. Under the evidence the failure of appellee to record his lease or take exclusive possession of the premises can not be said to have afforded appellant any reasonable grounds to believe this crib of corn belonged to Eggers nor can we find anything in this record which would justify us in concluding that appellee did anything to estop himself from asserting his title to this crib of corn against appellant. This was the view of the trial court in which we concur. The judgment will therefore be affirmed.

JUDGMENT AFFIRMED.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

203 I.A. 238<sup>2</sup>

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:





IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

OCTOBER TERM, A. D. 1939.

HYMEN POLLACK and WILLIAM  
POLLACK, doing business as  
Pollack Auto Sales,  
Appellants,  
vs.  
BERNARD J. SMITH,  
Appellee.

APPEAL FROM THE COUNTY  
COURT OF KANE COUNTY

DOVE, J.

The plaintiff, on October 1, 1938, caused to be taken from defendant, upon a writ of replevin issued by a justice of the peace, a 1935 Dodge truck, consisting of a chassis and a dump body. On appeal the County Court, on February 8, 1939, found the plaintiff entitled to the possession of the dump body and the defendant entitled to possession of the chassis and rendered judgment to that effect. In obedience thereto the chassis was returned by the plaintiffs to the defendant and no appeal was taken from that judgment. Thereafter the defendant, on February 8, 1939, filed his motion to assess damages for the wrongful taking of the chassis and the plaintiff filed a motion to strike the motion to assess damages. The motion to strike was denied



and upon a hearing before the court without a jury defendant's damages were assessed at the sum of \$300.00 and judgment for that amount rendered in favor of the defendant and against the plaintiffs and it is from that judgment that plaintiffs have appealed.

Appellee testified that he purchased this dump body from appellants in May, 1938 and that it was then attached by them to his 1935 Dodge ton and one-half chassis at a cost of \$110.00; that when so equipped it was intended to be used to haul sand and gravel; that he had operated passenger buses and trucks from 1930 to the date of the hearing; that between June and October, 1938 he worked six days and that was in July; that he joined the trucking union in August, 1938 and from that time until October 1, 1938, the date the truck was replevied, he had one job and that was the latter part of August and then he traveled twelve miles; that since October 1, 1938 he had been employed at the West Health Institute in Elgin and between that date and February 8, 1939, he earned \$20.00 per week or a total of \$340.00.

Leonard Gromer testified on behalf of appellee over the objections of counsel for appellants that the fair, usual, reasonable and customary rental value of this truck, chassis and body, from October 1, 1938 to February 8, 1939 was \$3.00 per hour equipped with a driver and that such a truck traveled on the average of approximately one hundred miles per day, that the union scale for truck drivers in Kane County at this time was \$1.00 per hour and that the \$3.00 per hour rental value included driver, truck, gasoline, oil, depreciation and everything except the material to be hauled. This witness further testified that during this period of time in this locality there was no demand for a chassis unequipped with a body.

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Hyman Pollack, one of the appellants, testified that he was and had been engaged in the business of buying and selling cars, trucks, chassis, automobile parts and bodies for thirteen years, that the fair, cash, market value of the 1935 Dodge chassis on October 1, 1938 was \$165.00, that he had had occasion to rent trucks similar to the one involved herein and the fair cash rental value of such a truck was \$3.00 per day without a driver or oil or gasoline; that with a driver and furnishing oil and gasoline the rental would be \$8.00 per day.

William Pollack, the other appellant, testified that he had been engaged in the business of buying and selling automobiles, trucks and parts for ten years and in his opinion the fair, cash, reasonable rental value of a truck such as the one here involved was between \$8.00 and \$10.00 per day, which would include driver, truck, gasoline and oil and that the usual and customary wages of a truck driver is between \$18.00 and \$25.00 per week. This witness further testified that the fair, reasonable value of the chassis of this truck on October 1, 1938 was \$165.00 and the fair, reasonable value of the body \$75.00 and that it cost \$40.00 to install the body on the chassis as it would take a competent mechanic at least sixty-five hours to do the work.

Appellants contend that they replevied a truck, consisting of a chassis and a body so connected as to form a single unit, that they could not obtain the body without also taking the chassis to which it was attached and therefore under these circumstances the statute confers no right to damages. Counsel further contend that even if appellee is entitled to recover, there is no competent evidence in this record to sustain the judgment.

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Counsel for appellee insist that by its judgment the County Court awarded one distinct part of the subject matter of the replevin suit to be retained by the plaintiffs and another distinct chattel to be returned to the defendant, that by so doing it has been definitely determined by a court of competent jurisdiction that the plaintiffs invaded the rights of the defendant and the fact that at the time the truck was replevied the body was an integral part thereof and could only be severed by extensive mechanical operations is no justification for the plaintiffs to have invaded defendant's rights and take from him his property and that the judgment of the trial court is sustained by the evidence.

Sec. 22 of Chap. 119, Ill. Rev. Stat. 1937, so far as applicable, provides that if the plaintiff in an action of replevin fails to prosecute his suit with effect or if the right of property is adjudged against him, judgment shall be given for a return of the property and damages for the use thereof from the time it was taken until a return thereof shall be made. By the judgment of the trial court the right of property as to the body of this truck was adjudged in the plaintiffs and the right of property in the chassis was adjudged against them. By the action of the appellants, appellee was deprived of the use of the chassis from October 1, 1938 to February 8, 1939 and under the foregoing provisions of the Statute appellee is entitled to recover the damages he sustained by reason of being deprived of that use.

The only thing appellee was wrongfully deprived of was the use of the chassis and under the statute the only damages the court was permitted to award would be an amount which would fully compensate appellee because he had been wrongfully deprived of the

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use of the chassis during that period. The evidence is that during that period of time there was no demand for a chassis unequipped with a body. In order to recover it was incumbent for appellee to establish by competent evidence the value of the use of this chassis during the time of its wrongful detention. This he failed to do. There is absolutely no evidence in this record as to value of the use of this chassis. All of the evidence regarding the rental value and use of a truck is predicated upon the proposition that appellee was wrongfully deprived of the possession of the truck, that is the chassis and the body. The only evidence there is in the record about a chassis unequipped with a body is that it had no rental value, that there was in fact no demand for a chassis only. The purpose of the statutory provisions authorizing a court to award damages is to compensate one who has been deprived of the use of his property by the wrongful act of another. If appellee could not have used the chassis had he had it in his possession or would not have used it, he was not pecuniarily injured. For instance if a sleigh or sled is wrongfully replevied and the proof disclosed that the plaintiff was entitled to the bed thereof but not the runners and further disclosed that during the time the runners were out of the possession of the defendant they could not have been used and that they had no rental value during that time, it must follow that the defendant suffered no pecuniary loss by being deprived of its possession and therefore he would only be entitled to recover nominal damages. Or if a farm tractor is wrongfully replevied in December and in March a judgment is rendered ordering the plaintiff to return it except its four wheels which are found to rightfully belong to the

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plaintiff and the proof disclosed that the implement without the wheels could not have been used for any purpose and that during the time defendant had been deprived of its possession the engine without the wheels had no rental value, would it be reasonable to say the defendant was entitled to recover a substantial amount because he was deprived of the actual possession of a portion of his tractor during those months in the absence of any proof as to the actual damages he sustained?

Before a judgment for any amount could be rendered in favor of appellee it was incumbent upon him to establish the damages contemplated by the Statute with reasonable certainty and the amount thereof can not rest upon speculation or conjecture. They must be established by proof. In the instant case this was not done, therefore the judgment of the County Court can not be sustained and that judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I A. 339

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:





In the Appellate Court of Illinois,

Second District

October Term, . 1939.

Theodore Vanderwall,

Appellant,

vs.

W. F. Beard,

Appellee.

Appeal from the Circuit Court  
of Winnebago County

HUTTMAN - J.

This suit was the result of a collision between the automobiles of appellant and appellee. It was tried before the court, wit out jury. The court found against appellant as plaintiff, and against appellee as counter-claimant. Appellant as plaintiff below, prosecutes this appeal.

Appellant lived in Milwaukee. On the night of March 24, 1938, he and his wife drove to Rockford to the home of his father-in-law. They arrived there at about one o'clock that night. His wife's father lived on the west side of a street that ran north and south. Appellant parked his car in front of the residence, close to the curbing, and entered the house for the purpose of retiring for the night. In a few moments he heard a crash and upon investigation found that appellee's car had collided with his car.

Appellee was driving south on the street in question and claims that he was driving some two or three feet from the west curb; that appellant's car had no lights burning, and that he did not see it until he was within fifteen or twenty feet of the car; that the car was of a color that blended with the landscape; that as soon as he saw it, he swung his car to the left in an effort to escape a collision; that the right front portion of his car struck the left rear part of appellant's car.

part of appellant's car.  
that the right front portion of his car struck the left rear  
swung his car to the left in an effort to avoid collision;  
blended with the landscape; and he was unable to see  
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Both cars were badly damaged in the collision and appellee sustained physical injuries. He states that the street was straight and that he did not notice any automobiles travelling the same at the time of the accident; and that as far as he knows, his car was the only one travelling the street at this time. He states his speed was between thirty and forty miles an hour; that his car was equipped with hydraulic brakes on all wheels, but that the time from when he first saw appellant's car and when the car collided, was so short, he doesn't think he succeeded in getting his foot from the gas pedal to the brake pedal in time to check the momentum of his car.

It appears from the testimony of the police officer, that appellant's car had been knocked over the west curbing and against a tree; and that appellee's car was on down the street, in front of appellant's car, with its right wheels up over the curb. The officer states that appellant's car was struck on the left rear portion.

Appellee filed a counterclaim against appellant. There is no controversy as to the damages sustained by each of the parties. Appellee also set up a city ordinance providing against the parking of automobiles on the streets at night without lights. Appellee claims that the place of the accident was a poorly lighted portion of the street, and the police officer corroborates him in this regard.

The trial court heard the witnesses and had the facts before it. Cases of this nature must depend upon the facts in each particular case for their disposition, as they are necessarily based upon alleged negligence, and in actions of this character, such a situation presents a question of fact. Even though a court of review may be of the opinion that the trial court could have just as readily found for the other party, yet unless it can say that

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the findings by the trial court in light of the manifest weight of the evidence, it should not disturb the judgment. The judgment is therefore affirmed. The additional abstract of record was not considered necessary to the proper disposition of this case and the same will therefore not be taken against applicant.

Judgment affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 339<sup>2</sup>

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On      31. 1939  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term A. D. 1929.

METROPOLITAN LIFE INSURANCE  
COMPANY, a Corporation,

Appellant,

vs.

JOHN VAN HYFTE, et al,

Appellees.

A. SEAL, CLERK  
COURT HOUSE, CHICAGO

HUFFMAN - J.

This is a contest among secured note holders, for priority as to the proceeds from an 80 acre tract of land.

On May 11, 1922, James Machesney owned this tract. On this date, he executed and delivered to John Fischer, as trustee, two trust deeds. The 80 acre tract was included among the lands described in each trust deed. The two trust deeds are referred to as first and second, thus denoting their priority as between them. The first trust deed was given to secure the payment of 15 notes in the principal sum of \$1000 each. The second trust deed was given to secure the payment of 10 notes in the principal sum of \$500 each.

On September 15, 1925, John Van Hyfte and his wife executed their note in the sum of \$28,000 to the Savings Bank of Kewanee, together with a mortgage on certain lands to secure payment of the note. This mortgage also included the said 80 acre tract.

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At the time Hyfte acquired title to the 80 acre tract and executed his mortgage to the bank, both trust deeds were of record. They were due five years after date, and the interest was payable annually. Each of them contained a provision that the grantor should have the privilege of paying any or all of the notes on any interest paying date on or after the third year. They each contained a provision that, when the notes and all expenses accruing thereunder should be fully paid, the trustee or his successor, should reconvey the premises to the grantor or his assigns.

The bank had a contract with appellant relative to the securing of mortgages or trust deeds on real estate. In the contract, the bank was designated as the correspondent. It appears that Hyfte was in the act of purchasing the 80 acre tract at the time he was seeking to procure the \$28,000 loan. He secured his deed to the 80 acres on August 31, 1925. He executed the note and mortgage for the \$28,000 loan on September 15, 1925.

There was some difficulty with the title to the lands described in the \$28,000 mortgage. On August 10, 1925, the bank wrote appellant stating its opportunity to make this loan, and recommended same as being a very well secured loan for \$28,000. It stated that it did not know the condition of the title when it took the application; that it considered the risk to be a good one, and concluded with the following: "This is an unusually well secured loan; the moral risk is A-1 and besides they are willing to pay a reasonably good commission and loans are very scarce these days so that if you can see any way in which this can be fixed up so that your company will take the loan we will be glad to have the benefit of your advice."

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The trustee Fischer, was also President of the bank. On December 29, 1925, he executed and filed of record as trustee, a partial release in each of the first and second trust deeds with respect to this 80 acre tract. On January 2, 1926, the bank assigned the note and mortgage to appellant. Under date of January 8, 1926, at the instance of the bank, the New York Title and Mortgage Company issued its title guaranty policy in the sum of \$28,000, to appellant, covering the land in its mortgage.

In 1934, appellant brought this suit, to foreclose the mortgage on the lands described therein. The complaint recited the execution of the first and second trust deeds on May 11, 1922, by Machesney to Fischer as trustee; it alleged that the trustee had long since died, but that prior to his death and on December 29, 1925, he, as trustee, released the 80 acre tract from both the first and second trust deeds, by an instrument in due and proper form, and that it was effective for the purpose of releasing said tract from the lien of each of the trust deeds. The complaint disclosed that the trustees of the John C. Proctor Endowment were the holders of the notes under the first trust deed; and that Florence F. Myers, Jessica F. Myers, Bertha F. Mandel, and Elsa Woolner were holders of the notes under the second trust deed. The complaint alleged appellant's rights to be superior to those of the defendant note holders under the trust deeds.

The trustees of the John C. Proctor Endowment filed answer denying that the 80 acre tract was released from the lien of the first trust deed by virtue of the action of the trustee; alleging that such release was made without right or authority and that it was unlawful; that appellant had notice of their





rights and interest in said tract by virtue of the first trust deed which was duly recorded; that their rights were superior to those of appellant and that they had a first and prior lien on the 80 acre tract. The defendant note holders under the second trust deed were defaulted.

The cause was referred to the master, who found the history of the transactions to be as above set out. The master found that the trustee did not have in his possession any of the notes secured by either the first or second trust deed, at the time he released the 80 acre tract therefrom; that the trust deeds were of record long prior to such releases; that no money was paid to any of the note holders thereunder because of such releases; that the trustee was without power to make the releases; and that the same were void as to the rights of the note holders under the trust deeds. The master found that the trustees of the Crocker Endowment had a first and prior lien on the 80 acres, as the holders of the notes under the first trust deed; that the holders of the notes under the second trust deed had a second lien thereon, which was prior to the rights of appellant; and that appellant had a third lien on said 80 acre tract. Appellant's objections to the master's report were overruled and stood in the trial court as exceptions thereto. The decree of the trial court was in accordance with the findings and recommendation of the master. Appellant has prosecuted this appeal therefrom.

It is the position of appellant that the trust deeds were not notice to all parties dealing with the title to this land, sufficient to put them upon inquiry as to the ownership of the notes secured thereby; that persons dealing with the title after the execution of the releases by the trustee, were entitled to presume that the trustee had full power and authority to execute

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such releases; and that in fact, he did have such power.

Appellant urges in support of its position, that the releases of the trustee were legal and effective as against the note holders under the trust deeds, citing *Wann v. Burnel*, 183 Ill. 523, and *Connor v. Vahl*, 336 Ill. 136, where the indebtedness was past due; and such cases as *Parsh v. Stover*, 363 Ill. 490, and *Lammertz v. Gaulty*, 191 Ill. 174, where the release was executed on the due date; and *First Trust Joint Stock Bank v. Piekok*, 357 Ill. 144, where the trust deed contained a prepayment privilege at interest bearing dates. We do not consider the above cases as controlling in this case, nor do we consider the case of *Kennell v. Herbert*, 342 Ill. 464, cited by appellant, as supporting its contention herein.

We shall now direct our attention to the rights of the note holders under the first trust deed. The evidence shows that the indebtedness thereunder was not due at the time of the release; that the release was not executed upon or near any interest paying date; that it did not indicate any money had been paid on the indebtedness, but to the contrary, clearly showed the debt was still due. The trust deed provided that before the property could be released or reconveyed to the grantor, the debt must be fully paid. It was a matter of record long prior to the execution of appellant's mortgage. The trustee did not execute the release until after appellant's mortgage had been taken and recorded. The holders of the notes under this trust deed, had no knowledge of the action of the trustee. They were in possession of the notes. Nothing was paid on their indebtedness for the release. As stated in *Kennell v. Herbert*, supra, we do not consider the release to have had any effect on the rights of the owners and holders of the notes under the first trust deed.

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order. The first order book is the first order book.

Appellant claims to be assignee of the mortgage. In equity it took same subject to existing infirmities. *Torberg v. McDermick*, 194 Ill. 205; *King v. Carpenter*, 306 Ill. 302; *Ellis v. Cummings*, 31 Ill. 183.

The note holders under the second trust deed, filed no answer setting up their claim, made no appearance, and were defaulted. The pleadings in the case in no way went to support a finding in their favor. Appellant alleged its rights to be superior to their rights, and exhibited the release by the trustee, releasing this tract from the lien of their trust deed. The defendant note holders under the first trust deed filed answer and amended answer setting up their claims and alleging the release as made by the trustee with respect to the first trust deed, to be wrongful and without their knowledge or consent; and supported this position by evidence upon the hearing. We find no evidence in the record going to establish any rights or priority on the part of the defendant note holders under the second trust deed. Evidence regarding the release by the trustee under the first trust deed cannot be considered as evidence to control a court's action with respect to the trustee's release under the second trust deed. The trust deeds were separate instruments. The releases were separate instruments. The parties interested thereunder are entirely different and distinct. Proof was made before the master of the amount due under the first trust deed and under appellant's mortgage; and the master found the proper amounts due thereunder. No proof was made before the master as to the amount due under the second trust deed, and he made no finding thereof. Nor does the decree find how much is due under the second trust deed. The decree should have judicially determined

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the amount due under the second trust deed. *Lemberg v. Quernick*, supra, p. 211, 212. Therefore, we find nothing to support that portion of the decree granting priority to such defendants over appellant. In a mortgage foreclosure, a junior incumbrancer who is made a party defendant, by one claiming to be the holder of the senior mortgage, may have his rights determined and priority fixed, by answer, without the filing of a cross-bill. *Armstrong v. Harrington*, 111 Ill. 430; *Hallen v. Wors*, 137 Ill. 196; *Gardner v. Cohn*, 191 Ill. 553; *Hoswick v. Franz*, 246 Ill. App. 1; *Moore v. Clark*, 129 Ill. 466, 493. Such a defendant may, by motion or by filing an answer, offer evidence of his lien and thus establish his claim. *Northern Trust Co. v. Sanford*, 308 Ill. 381, 389. Where various mortgagees are in dispute as to priority, a defendant is under the duty of setting up his interest by proper pleading and establishing it by proof. He should not fail to take steps to establish his claim when the same is properly challenged by the foreclosure suit, and thus brought into dispute.

The decree is correct in so far as it granted priority to the trustees of the Proctor Endowment, as owners of the notes under the ~~xxxx~~ first trust deed. The holders of the notes under the second trust deed presented no evidence to support their claim or to establish priority. Therefore, that portion of the decree finding the defendant note holders under the second trust deed to have a prior lien on the premises, to appellant, is erroneous. The decree is reversed and the cause remanded with directions that the same be modified with respect to the rights of priority as between appellant and defendant note holders under the second trust deed, and made to read, that appellant shall have a second lien on the 80 acre tract, instead of a third lien.

Reversed and remanded with directions.

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STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October,  
in the year of our Lord one thousand nine hundred and  
thirty-nine, within and for the Second District of the  
State of Illinois:

303 I.A. 340

Present -- The Hon. FRED G. WOLFE, Presiding Justice  
Hon. BLAINE HUFFMAN, Justice  
Hon. FRANKLIN R. DOVE, Justice  
JUSTUS L. JOHNSON, Clerk  
E. J. WELTER, Sheriff

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A.D. 1939.

MINNIE F. CHAPMAN, )  
 Appellee, )  
 vs. )  
 EMMA F. CHAPMAN, formerly )  
 FRANKIE CHAPMAN ABBOTT, )  
 Appellant. )

APPEAL FROM CIRCUIT COURT  
 KANE COUNTY.

HUFFMAN - J.

This is a suit for accounting by appellee against appellant, for rents received from business property located in the city of Aurora, known as the Chapman block. Its disposition hinges upon a former decree of the circuit court of said county, between the same parties, rendered on May 27, 1927. By this present suit, appellee claims to be entitled to one-third of the net rents issuing from the above property, pursuant to the former decree of May, 1927. Appellant does not question appellee's rights to the accounting as fixed by the former decree, but insists that the portion of the former decree awarding to appellee one-third the rents from the property, was void, on the ground that it was not within the subject matter of the litigation, and beyond the prayer of the bill of complaint. In this respect, it is the position of appellant that the court was without jurisdiction to incorporate such relief in its decree, as the same was not pursuant to the pleadings in the case nor included within the relief sought

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by the widow (appellee) in her bill of complaint. Appellant urges that relief can not be granted for matters not charged in the bill. The trial court held in the case at bar that the portion of the decree of May, 1927, which decreed to appellee one-third of the net rents and profits from the premises during her lifetime, was within the scope of the issues in that cause and is now binding upon the parties to this proceeding; that appellee could maintain this action upon the former adjudication; and granted relief accordingly.

By the decree of 1927, the court provided that appellant should account to appellee for one-third of the net profits resulting from the rents issuing from the premises in question. It is alleged and admitted by appellant that she did thus account to appellee for one-third the rents up to January 1, 1935. Since that time appellant has failed to account to appellee for such rents. This suit resulted, based upon the decree of 1927, to compel appellant to account to appellee for the one-third part of the net rents and profits realized from the property, subsequent to January 1, 1935.

Mathew T. Chapman, the owner of the property, died intestate in 1921, leaving surviving him his wife (appellee) and his daughter (appellant). In 1926, appellee filed her action in the circuit court, setting up that Mr. Chapman had died seized with the premises in question; that he left no will; that appellee as his surviving widow, was entitled to dower in the property; that the premises were improved with a large business building; that no dower had ever been assigned to her and that she had never received any compensation therefor, or its equivalent in any manner. Appellant was made defendant in such petition. Appellee prayed that a decree might be entered, granting her recovery of her dower





right; that her homestead be fixed; and that she have such other and further relief as equity might require.

Appellant made answer to the petition, wherein she admitted that dower had not been assigned or set off to appellee; alleged that no demand had ever been made upon her for same, except by the filing of the petition; denied that appellee was entitled to any part of the rents or income from the premises prior to the date of the filing of her petition therefor; and denied that appellee was entitled to any of the relief sought in said petition. Appellant in that proceeding also filed a cross-petition, in which she set up that the property was improved by a large building of concrete, steel and brick, five stories high, and occupied by various business establishments. She further charged that appellee and her father had occupied certain rooms on the third floor as a residence; that following the death of Mr. Chapman, appellee collected the rents and made extensive repairs to the buildings, without accounting in any way to the cross-petitioner (appellant); that appellee so collected the rents until about March, 1923; that she had never made any demand on appellant for an assignment of her dower; that no dower had ever been assigned; and that by reason of the failure of appellee to make demand for such assignment, she was not entitled to receive any portion of the rents from the buildings on the premises accruing prior to June 10, 1926, which was the date she filed her petition for assignment of dower and homestead. The cross-petitioner further set up that she, being of the impression that appellee was entitled to receive one-third of the net income from the premises, without demand, and without any assignment of dower, had paid to the said appellee from the rents collected by

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appellant, from March 24, 1924, to December 31, 1925, a total sum of \$5739.95. She alleged that the above sum of money so paid by her to appellee, constituted a one-third of the net income received from the premises. She charged that appellee received the sum of money as a full one-third of the net income from the property. She further charged that she was entitled to be credited for such sum upon any amount found to be due appellee as dower. She alleged that appellee still occupied the living quarters in one of the business buildings that had been occupied by appellee and Mr. Chapman during his lifetime. Appellant as cross-petitioner, prayed that appellee might be required to make answer to her cross-petition; that an account be taken by the court of the amount due the cross-petitioner for rents which had been received and retained by appellee; that the court determine the proportionate share of the taxes which should be paid by appellee on account of the rooms occupied by her as a residence; that she be required to pay her proportionate share of taxes and insurance premiums; that appellee be allowed credit of \$1000 as her homestead in the premises, and that upon payment of such sum to her by cross-petitioner, she surrender possession of the rooms occupied by her, and that in the adjustment of their rights in the property and the issues therefrom, that the cross-petitioner be given credit for such sums of money as she had already paid to appellee from the rents received from the property.

Appellee answered the cross-petition, wherein she admitted her occupancy of the rooms in which she and Mr. Chapman had made their residence. She admitted that following the death of Mr. Chapman, she collected the rents and made repairs for a time, but alleged that she made an accounting to appellant for same.



She alleged that following the death of Mr. Chapman, she and appellant entered into an agreement, by the terms of which, she took charge of the premises, collected the rents, made repairs and improvements, and from the balance remaining, that she was to pay, and did pay to appellant, two-thirds of the net rent, and retained one-third thereof. She further alleged that pursuant to such agreement, she did the things above set out, from June, 1921, to April 1, 1923, and that during such time she accounted to appellant for her two-thirds portion of the net rents. She then set up by her answer that on March 22, 1923, appellant advised her that she would take charge of the collection of the rents, and that thereafter appellant, through her agent, did collect the rents after April 1, 1923. She denied that after such time, appellant accounted to her in any way for any portion of the rent so collected, and had failed and refused to pay to her any part of the net rents. She denied that she failed to make demand for the assignment of her dower, and averred that because of her demand in this regard, the above agreement between her and appellant was reached, whereby she was to receive one-third the net rents and appellant to take two-thirds thereof. She denied that appellant was entitled to any further accounting from her for the rents that she collected prior to April 1, 1923. In her answer to appellant's cross-complaint, she alleged her right to receive one-third the net rents and profits subsequent to April 1, 1923, and asked that upon the fixing of same, she might have a lien on the premises therefor.

When the above proceeding came on for hearing before the circuit court of Kane county, at its May term, 1927, the court entered a decree wherein he found that appellee, upon the death of



Mr. Chapman, became entitled to a one-third part of the premises involved; that the premises were improved with business buildings constructed of steel and concrete, of the approximate size of one hundred by four hundred feet, and varying in height from four to five stories; that they were occupied by various tenants, who held leases ranging from one to five years in period of time, that the rents were payable monthly; that the premises were not susceptible of division without injury and without manifest injustice to the parties to the suit; and the court decreed that the prayer of the original petition of appellee that dower be set off to her, be denied. With respect to the cross-petition of appellant, and the answer thereto by appellee, the court found that appellee and Mr. Chapman had occupied a portion of the premises as a homestead; that following his death, appellee had continued to occupy the same as her home; that one of the buildings was not wholly completed, and on July 15, 1921, appellee and appellant entered into an agreement to complete the construction of the building, and that the same was completed at a cost of \$37, 476.18, of which sum appellant contributed ~~two~~ two-thirds and appellee one-third; that by reason of the completion of this building, the value of the estate owned by appellant was thereby greatly enhanced. The court further found that the parties hereto agreed between themselves that appellee might remain in possession of the premises and collect the rents therefrom, pay the taxes, insurance, and keep up general repairs, retaining to herself one-third of the net rents in lieu of her dower, and pay to appellant two-thirds of the net rents; that pursuant to the terms of such agreement, appellee remained in possession of the premises following the death of Mr. Chapman, until April 1, 1923; that during said time, she carried out the

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terms of the agreement and that the net rents were divided between the parties pursuant thereto.

The court further found by its decree that this action of the parties following their agreement, constituted a parol assignment of rents in lieu of dower, and that by virtue thereof appellee became a tenant in common with appellant in the rents and profits of said premises, and that the parties were the tenants in common of said rents and that appellee was entitled to one-third thereof for and during the remainder of her life, and that no further demand for the assignment of dower on her part, was necessary. The court found by its decree that appellee had fully accounted to appellant for her portion of the rents arising from the premises during the time appellee collected same, which was until April 1, 1923. The court found that pursuant to request and demand of appellant, appellee turned over to her the management of the premises and the collection of the rents, on April 1, 1923, and that since said date, appellant has collected all the rents arising from the premises, and has been in full charge thereof. The court further found that appellant from April 1, 1923, to December 31, 1926, had collected in rents from the premises the sum of \$36,018.69; that from such sum appellee was entitled to receive one-third thereof, being \$12,006.23; that on March 24, 1924, appellant, by her check, paid on account to appellee the sum of \$1484.54, and that on March 2, 1925, by check, she again paid on account the sum of \$2098.12; that on March 6, 1926, by check, she again paid on account to appellee, the sum of \$1777.23. The court then found there was a balance due appellee upon her one-third of the net rents from the premises, from April 1, 1923, to December 31, 1926, the sum of \$5986.34, which was due, unpaid and owing to her



by appellant, in lieu of her dower. The court then ordered appellant to pay to appellee \$5986.34, the amount found due her as aforesaid. The court found that appellee was entitled to receive one-third the net rents from the premises during the remainder of her lifetime. The decree then shows that pursuant to the terms thereof, appellant paid to appellee the sum of \$5986.34, which had been found due. By said decree, the court finds, that since the above provision has been complied with by appellant, that it constitutes full payment and satisfaction to appellee of all that was due her from one-third of the net rents, up to and including December 31, 1926. The court then finds that appellant shall thereafter pay to appellee one-third the net rents, in lieu of her dower. The court further found that appellant had paid into court the sum of \$1000, for the purpose of extinguishing the homestead estate of appellee, and that appellant was thereby entitled to have said homestead estate extinguished. The court ordered the clerk to pay to appellee the \$1000, upon satisfactory proof that she had vacated the portion of the premises where she had been making her home. The decree was entered under date of May 27, 1927. No appeal was ever taken therefrom.

Appellant continued to carry out the terms of the above decree to January 1, 1935. Since that time she has failed and refused to carry out the terms of the decree by paying to appellee the one-third portion of the net rents from the premises. Due to such failure on the part of appellant, appellee brought this action in October, 1936, to compel appellant to comply with the terms of the former decree.

The court by its decree in this case found that the decree entered in the former suit, was binding upon the parties, and

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entered a decree for appellee in conformance with that of 1927, and this appeal results therefrom.

As previously stated, appellant takes the position in this case that the decree of 1927, providing that appellee should receive one-third of the rents, in lieu of dower, was void, as not being within the subject matter of the litigation between the parties nor within the issues presented by the pleadings. In the rendition of a judgment, a court must remain within its jurisdiction and powers. *Armstrong v. Obucino*, 300 Ill. 140. Jurisdiction may be considered to be the right to adjudicate concerning the subject matter of a case. In order to comply with this condition, the points decided must be, in substance and effect, within the issues presented. This situation might be said to follow from the universally recognized rule that a court is limited in its determination to matters properly before it. Questions not involved in litigation to which the court's jurisdiction is invoked, ordinarily are not questions within the issues. However, the parties may voluntarily try an issue outside the pleadings. In an equitable proceeding, a prayer for general relief authorizes the court to grant any relief within the issues presented by the bill of complaint. Where a court has jurisdiction of the parties and of the subject matter, it may bind the parties by its judgment or decree even though its acts in some respects are irregular. And any errors that might exist under such circumstances, do not serve to render the judgment void, although it might be subject to a reversal in a reviewing court. It is a well established doctrine, that where a court has once acquired the requisite jurisdiction, it has the right to decide every question which arises in the cause between the parties, and its judgment and decree, however



erroneous, cannot be collaterally assailed. *Weberpals v. Jenny*, 300 Ill. 145, 154; *O'Connor v. Board of Trustees*, 247 Ill. 54, 57, 58, 59.

The petition filed by appellee in 1926, was for the purpose of having her dower and homestead assigned and set off in the premises in question, according to the statute in such case ~~FOR THE~~ ~~PUT~~ made and provided. The court took jurisdiction of the case for the purpose of fixing such rights of appellee in the property. Therefore, it follows that such questions were the subject matter of the litigation. Each party was heard fully upon these issues and the court rendered the decree of 1927, adjudicating appellee's dower and homestead rights in the premises. In view of the character of the property, the court had the right to assign to appellee one-third of the net rents and profits as a tenant in common with appellant, as her dower therein. *Klein v. id.*, supra; Sec. 39, ch. 41, Ill. St. (Dower Act). He also had the power to adjudicate appellee's homestead rights. The matters which appellee sought to have determined by the prior proceedings were statutory rights peculiar to the widow, for which she might institute her suit to have enforced. The matters settled by the decree of 1927, went directly to disposition of these rights as between the parties to the suit.

Appellee brings cross-appeal with respect to that portion of the decree concerning certain maintenance costs to be applied to the upkeep of the building; and which were permitted to be deducted from the gross receipts therefrom. We do not find anything inequitable in that portion of the decree.

We are of the opinion that the decree of May 27, 1927, was valid and binding upon the parties thereto; that their rights





regarding the subject matter of this suit were therein fixed; that the court had jurisdiction and power to render the decree; and that appellant is now precluded from making a collateral attack thereon.

The judgment of the trial court is affirmed.

Judgment affirmed.

*Journal of Interpersonal Violence* 26(10) 1978-1997  
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STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



near filed - 11-11-37  
 Abstract - Denied - 11-11-37

PUBLISHED IN ABSTRACT

The Commissioners of the Nutwood Levee and Drainage District of Greene and Jersey Counties, Illinois, Plaintiffs-Appellees, v. Neal D. Reardon, Charles Carroll Reardon, Michael Reardon, Marie McGinnis, N. D. Reardon, as Executor of the Last Will and Testament of F. G. G. Reardon, deceased, State Bank of Jerseyville, an Illinois Banking Corporation, and Otto Kraushaar, Defendants-Appellants.

303 I.A. 443

*Appeal from Circuit Court, Jersey County.*

Gen. No. 9143

MR. PRESIDING JUSTICE RIESS delivered the opinion of the Court.

A petition for the appointment of a receiver and for an injunction to prevent the sale of certain corn rents arising from farm lands described therein was filed by the Commissioners of Nutwood Levee and Drainage District against Neal D. Reardon personally and as executor of the Last Will and Testament of F. G. G. Reardon, deceased, and other defendants for the purpose of collecting certain drainage taxes and penalties alleged to be due and unpaid on said lands. A temporary injunction was granted upon giving bond with sureties in the sum of \$500 restraining the defendants from disposing of certain corn rentals pending the hearing upon said petition, which said temporary restraining order was issued on the fourteenth day of December, A. D. 1936, and thereafter on the seventh day of May, A. D. 1937, upon motion of certain of said defendants, was dissolved and the petition was later dismissed upon motion of the petitioners. Suggestions of damages were made by Neal D. Reardon personally and as executor in the way of fees alleged to have been incurred in procuring dissolution of the injunction,



upon hearing of which such damages were denied by the Court, from which latter order an appeal was taken by said defendants to this Court.

The claim for alleged damages was predicated upon the following provisions of Section 12 of Chapter 69 of the Revised Statutes of Illinois, 1937: "In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

The motion filed by said Neal D. Reardon, defendant, who is a practicing attorney, acting as his own attorney owning an interest in fee, and as such Executor, recited "that they were put to necessary expense in defending in the above cause, and specifically in the motion to dissolve the injunction that was issued in said cause, and that it was necessary to secure legal counsel in the actions and proceedings aforesaid, and that this Honorable Court is requested to hear the defense on the sums paid and due for attorneys' fees or such other sum in that regard as this Honorable Court may deem fit and just."

Informal assignments of alleged error by the Court were set forth in appellants' brief in substance as follows: That defendants' motion for damages should have been allowed and that the Court erred in denying the same and in not finding that defendants were compelled to become obligated to pay money for attorney fees in the way of damages for legal services of said Neal D. Reardon and Attorney Smith.

At the time of the issuance of the temporary restraining order on the fourteenth day of December, A. D. 1936, about 1500 bushels of corn rentals were on hand, the fair cash market value of which was shown to be ninety to ninety-five cents per bushel. On May 10, 1937, when the restraining order was dissolved, the fair cash market value of corn had risen to \$1.25 to \$1.30 per bushel, increasing the market value thereof approximately \$450. The rents were sold and placed to the personal account of Neal D. Reardon in a bank in Tazewell County, Illinois, and were not disbursed





towards the payment of taxes, claims against the estate of F. G. G. Reardon, or otherwise.

Plaintiffs contended that defendants' suggestions of damages did not substantially comply with the requirements of the statute in that neither the amount nor the nature of the damages were set forth in the written suggestions filed therein, as required by the above quoted statutory provision. The plaintiffs further denied liability for such alleged damages because of the advance in the market value of the corn and failure to show any special damages incurred by said defendants and further contended that since Neal D. Reardon acted as attorney for himself personally and as executor, he could not charge or collect attorney fees for his own use; further contended that he was not acting by employment or any express or implied agreement with the remaining defendants to represent them as counsel in seeking the dissolution of the temporary injunction, in which motion the said defendants had joined a brother as an additional defendant long subsequent to the time of filing and hearing on his motion and allegedly without the consent or knowledge of such remaining defendant, whom he claimed to be representing as attorney. Plaintiff further contended that said defendants could not recover because he had failed to separate his claim for services alleged to have been performed in connection with his motion to dissolve the injunction and certain other services alleged to have been performed as defendants' attorney in the receivership case, for all of which he sought to prove a lump sum of five hundred dollars in attorney fees to be so due defendants as damages.

He testified that in connection with the motion to dissolve the temporary writ, he had spent two days in going about and consulting attorneys in three other counties with the view of procuring assistance, in which he failed, but for which he asked per diem payments of \$25.00; that he spent eight days in working in his library looking up law at 25.00 per diem; that he attended different Court sessions in connection therewith and that he had consulted Attorney Smith, who appeared with him in Court on one occasion. Two attorneys who testified in answer to hypothetical questions by Reardon recited that the usual and customary fees for such services would be \$350 to \$450. This question included the various per diem charges, the necessity for much of which did not seem to impress the Chancellor under the facts and circumstances dis-



closed by the record, as well as other services not pertinent to the motion to dissolve.

In passing upon the question of damages, the Trial Court found the issues of law and fact against the petitioner and sustained the contentions of the plaintiff. From an examination of the abstract and record, we are constrained to hold that said Reardon failed to establish that he had been employed by any of the other defendants to represent them by joining them in his motion without their consent, subsequent to the filing thereof and charging and claiming attorney fees therefor.

We are further of the opinion that he could not charge and collect attorney fees as damages for personal services in appearing and defending on his own behalf. Where the defendant acts as attorney in the case, the law does not permit him to claim an attorney fee of the opposite party for attending his own suit.

In the case of *Jerne & Almini v. Osgood*, 57 Ill. 340, in which damages were sought to be recovered upon dissolution of an injunction wherein the defendant acted pro se as attorney, it is said by the Court at page 347 that "We do not believe the law intends that an attorney may claim of the opposite party a fee for attending to his own suit, much less one that seems to us to be exorbitant." Nor do we deem it proper to allow as damages the fees and expense of the defendant in going about to other counties vainly seeking advice or legal assistance or in preparing or attending Court in his own behalf. *Martin v. Jamison*, 39 App. 248.

Concerning the failure of the defendant to set forth in his suggestions for damages either the precise nature or amount of such alleged damages, it was said in the case of *Winkler v. Winkler*, 40 Ill. 179, at page 185 that the suggestions in writing were designed to take the place of a declaration. To confer jurisdiction on the Court to award damages, it is necessary that suggestions be filed in writing stating both the nature and amount of the damages; and where this is not done, it is error for the Court to make an assessment. *Hamilton v. Steward*, 59 Ill. 330, 334; *Forth v. Town of Xenia*, 54 Ill. 210, 212.

In this respect, the suggestions of damages did not substantially comply with the requirements of the statute. These matters were pointed out to the Trial Court and were considered in passing upon the motion to assess damages.

It is further pointed out by the plaintiff in the alleged suggestions for damages, as well as the hypothetical



questions propounded to defendants' witnesses, that the alleged services in the receivership case other than the motion to dissolve the injunction were included. An examination of the record also discloses this fact, which was before the Trial Court when the motion was decided.

We held in the case of *Leonard v. Pearce*, 271 Ill. App. 428, at page 443, that "The law is well settled in this State that a defendant may recover as damages upon the dissolution of a temporary injunction, the solicitor fees which he has paid or become obligated to pay, for services rendered in obtaining a dissolution of an injunction, but not those rendered in the general defense of the suit. *Lambert v. Alcorn*, 144 Ill. 313. Only such services as were rendered in getting rid of the preliminary injunction on a motion to dissolve are recoverable as damages and where the evidence makes no discrimination between services rendered in the case generally and services which were strictly necessary to procure the dissolution of the injunction, there is no evidence upon which the assessment of damages can be based, and an allowance in such a case cannot be sustained. 32 C. J. 477; *Zibell v. Barrett*, 30 Ill. App. 112; *Landis v. Wolf*, 206 Ill. 392; *Jerne & Almini v. Osgood*, 57 Ill. 340; *Alexander v. Colcord*, 85 Ill. 323; *Dempster v. Lansingh*, 234 Ill. 381. \* \* \* The damages assessed upon the dissolution of an injunction should be only for the additional expense incurred in procuring the dissolution over and above those necessarily incurred in preparing the case for hearing on the merits. *Blair v. Reading*, 99 Ill. 600."

While the assignment of errors by appellant was general and subject to criticism, we have considered all assignments of error and we are in accord with the findings and decision of the lower court on the questions of law and fact.

Finding no reversible error in the record, the orders and decree of the Circuit Court of Jersey County will be affirmed.

*Decree Affirmed.*



## AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in  
the year of our Lord one thousand nine hundred and forty, within  
and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 I.A. 443<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On

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the Opinion of the Court was filed in the Clerk's Office of said  
Court, in the words and figures following, viz:





IN THE

COURT OF COMMON PLEAS

FOR THE COUNTY OF HENRY, VIRGINIA

1935, . . . 1932.

LOUISIANA, . . . 1932.

VS.

HENRY, . . . 1932.

OF THE COUNTY OF HENRY, VIRGINIA

ROSE, . . J.

The plaintiff-a . . . , born . . . , started suit in the Circuit Court of Henry County, against the defendant-assailant, . . . . She alleged in her complaint that on October 10, 1935, with force and arms, the defendant assaulted her and violently seized and laid hold of her, beat, bruised, wounded and ill-treated her, and struck her diverse blows with his fist, in the face and eyes, and other parts of the body, and did with violence, knock her down, and tore and damaged her clothing.

The second count is substantially the same as the first, but adds that the assault was committed wilfully and wrongfully. Both counts charge that plaintiff was hurt and incurred medical expense, and suffered loss by being unable to attend to ordinary affairs, and business, caused by such injuries; that she was injured by said assault, and claimed damages in the sum of \$10,000.00.

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The defendant, Fremont Bates, files his answer to this complaint, and denied such of the allegations of paragraphs 1, and 2, of the complaint, as charge that the plaintiff, at the time and place so stated in her complaint, maliciously and unlawfully struck the defendant, causing the defendant thereby to defend himself against the plaintiff, and in so doing, the defendant committed the supposed trespasser mentioned in the complaint, and if any hurt or damage to him and there happened so to the plaintiff, the same was occasioned by the said assault so made by the plaintiff upon the defendant, in his necessary defense of himself against the plaintiff. The defendant further says that in no defense of himself, he used no more force than was then and there necessary to save himself from great bodily harm and injury, at the hands of the said plaintiff. To this answer, the plaintiff filed a reply. The case was tried before a jury, who rendered a verdict in favor of the plaintiff in the sum of \$50.00. The court entered judgment on the verdict in favor of the plaintiff. The court overruled the defendant's motion for a new trial, and the judgment for the plaintiff for \$500.00 was allowed to stand, and it is from this judgment, that the appeal is prosecuted.

The evidence discloses that Lona Hodgett, with her father, James H. Bates, drove to the place where Fremont Bates, the defendant, and uncle of Lona Hodgett were; that James Bates and Fremont Bates were discussing a matter of business; that during the discussion, Lona Hodgett asked about some notes, and Fremont Bates said, "You are a damned dirty snot always sticking your nose in business," and in reply to this, Lona Hodgett said, "I don't have to take that from a dead beat." There is some dispute as to the exact language used by the parties, but this is the substance of

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the epithet which caused the fight. Mr. McDougall claims that Fremont Bates was enraged, and started around the car; that she got out of the car; that he was the one who first started the assault; that he is a man weighing about two hundred and fifty pounds, and is active for his age. There is no dispute about the plaintiff being knocked down, or that the defendant beat, and struck her while she was on the ground. James Bates tried to pull Fremont Bates off of his daughter, but could not do so, and called for help. In response to the call for help, Edward Dougan, a boiler-maker by trade, who was close to the scene of the trouble, ran over and helped take the defendant off of the plaintiff. James Bates's testimony corroborates his daughter, Lona McDougall, in that Fremont Bates was the aggressor in the fight.

Fremont Bates, in his testimony, relates the circumstances of the quarrel at the car, but says that his brother called him a "Burned liar." His testimony in other respects to the conversation at the car, is practically the same. Fremont Bates claims that his niece called him a vile name, and started toward him, "With claws at me;" that he put up his arm and dropped his cane, and fell to his knees; that she was right there on the ground, and she grabbed hold of him. He admits striking her numerous times, but claimed it was done to protect himself, and to make her let go of him.

These three witnesses are the only ones who testified in regard to the assault, or what preceded. Lona McDougall and her father testified positively, that Fremont Bates was the aggressor in the fight. Fremont Bates denies it. By his pleadings, he admits that he assaulted and beat the plaintiff, but claimed that it was done in self-defense, and the burden of proof was upon him to main-

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I am sure that he acted in the right.

tain this issue. From the examination of the record, it is our conclusion that the evidence preponderates in favor of the plaintiff, and that Arment later was the aggressor in this fight, and that the defendant has failed in his proof, that the striking and beating of the plaintiff was done in self-defense.

The appellant complains that the court erred in allowing the doctor to testify in regard to a bill, and also that the hypothetical questions asked of the doctor were not in the proper form. We do not pass upon the merits of this assignment of error, because this testimony would only concern the amount of damages, if any, the plaintiff was entitled to recover. It is not disputed but that the plaintiff was injured in this assault. An examination of the abstract discloses on pages 11, and 12, that the plaintiff, without any objection, testified to different items which she was required to expend and losses sustained, amounting to \$721.00. This amount does not include any damages for any injuries, but doctor bills, hospital bills, nursing and other expenditures that she was required to make on account of her injuries. Therefore, the testimony of the amount of the doctor bill is immaterial in this case.

Numerous objections are made to the instructions given on behalf of the plaintiff, and those offered by the defendant, but refused by the court. The given instructions fairly presented to the jury the issues which they were to decide. While some of them may not have been as well drawn as they might have been, yet taken as a whole, the jury could not have been misled, as to the law of the case.

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We do not think the court erred in refusing to permit the defendant to state that his intentions were, while he was assaulting and beating the plaintiff, to kill him. Intent must be drawn from his acts. The defendant was permitted to tell his version of how the affair started, and what each of the parties did during the struggle. It is then for the jury to determine what the intention of each of the parties was at the time of the altercation.

On the whole, we think that the verdict of the jury is sustained by the evidence in the case, and the judgment of the trial court should be affirmed.

Affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and forty, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

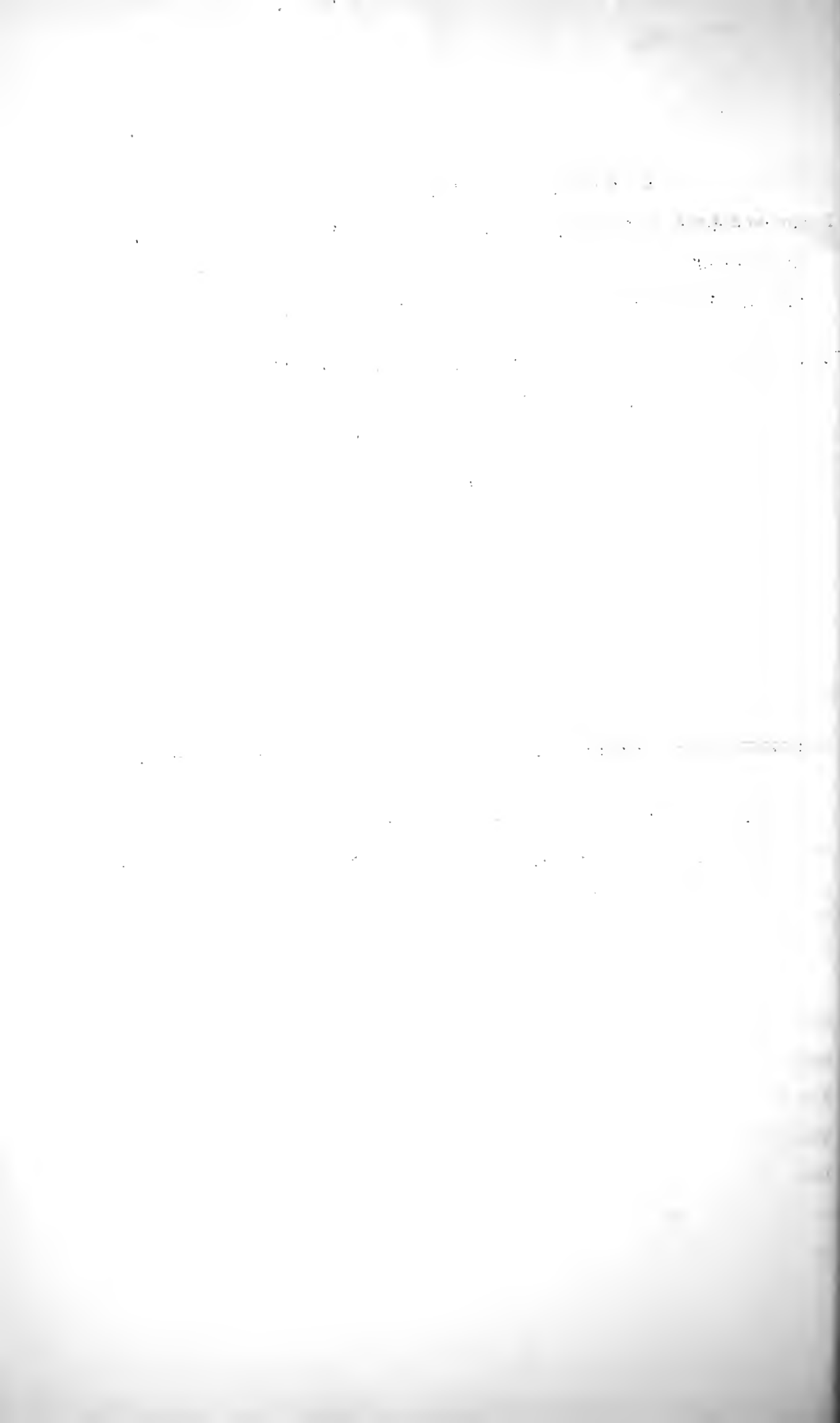
JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 I.A. 444

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BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:



Lockwood Glass Company, a corporation;  
Alexander-Belley Lumber Company, a corporation;  
Joliet Plate Window Glass Company, a corporation;  
Keefer-Lane Company, a corporation;  
Barrett Hardware Company, a corporation; and  
Joliet Lumber & Fuel Company, a corporation.

Complainants-Appellants,

vs.

Harry L. Love, Versus: Harry E. Gullett, with L. Goodspeed, John Rodin, trustee; Mary Swanson, Artie Sunbaum, Mary A. Risen, Margaret Kenrahan, George L. Spangler, George E. Platt, Jr., Receiver of the Estate of Edith L. Goodspeed, alleged bankrupt, Theodore A. Gross, Trustee, and unknown owners,

Defendants-Appellees.

the Circuit Court of  
Ill. County,  
Illinois.

WOLFE, P. J.

A suit in the nature of a creditor's bill was filed by the Lockwood Glass Company, a corporation and others, in the Circuit Court of Will County, against Harry L. Love and others, seeking to set aside a mortgage in the nature of a deed of trust for \$10,000.00, which Harry L. Love and his wife and his brother-in-law, Harry E. Gullett, executed on the property involved in this suit. It is alleged that the conveyance was a fraud and sham, as to the plaintiffs. The plaintiffs also ask an order of court for

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the surrender of a warranty deed for the premises from Harry W. Gullett to Harry B. Love, and also to have set in the deed a trust deed surrendered with the deed, and also to have set in the deed a valid consideration for the mortgage on the deed in question. The defendants filed their answer to the bill of complaint, and denied that there was any fraud in the transaction, and also that there was a good and valuable consideration for the deed.

To support the contention of the defendants that there was a valid consideration for the transaction, Harry W. Gullett was called as a witness on behalf of the defendant, and his testimony was that in the year 1921, James B. Love and his wife, Harry B. Love, one of the appellates in the present suit, came from their home in Joliet to reside in Harry W. Gullett's father's home and borrowed \$4000.00; that Mr. Gullett borrowed the money from a small safe which he kept in his living room, and handed the money from a small safe which he had to James B. Love; that at that time James B. Love executed a note for \$4000.00; said note was to bear interest at the rate of 7% per annum; that in May 1931, his father, Harry W. Gullett, made him a present of this same note; that at various times Harry W. Gullett had advanced money to Harry B. Love, and at the time of the execution of the notes and trust deed in question, Harry B. Love was indebted to the witness in the proximate sum of \$10,000.00; that the cancellation of this indebtedness was the consideration for the deed from Harry B. Love and his wife to Harry W. Gullett of the property in question; that the deed was executed on May 21, 1932, and on the

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same day that the Loves decided to make a loan, Gullett executed a deed conveying the title to the property. The deal from Gullett to Love was never recorded; and it is not to be let the Loves in making a loan, in such a case of this kind, Harry H. Gullett signed the note in lieu of legal testimony; that he is a brother-in-law of Harry W. Love. He did not further testified that at the time his father loaned money to Love for \$4800.00, he saw James W. Love sign the note that is in issue in this suit.

The signature of J. W. Love on the purported note is claimed by the appellants to be a forgery, and not the true signature of James W. Love. Harry W. Love and her Gullett, the former wife of Charles H. Gullett, testified that they were present and saw J. W. Love sign the note, and also saw Mr. Gullett, senior, take money from the safe and deliver it to Mr. Love.

On behalf of the appellants, Harry W. Gullett of Joliet, Illinois, was called as a handwriting expert. His testimony showed that he had vast experience in the examination of writings, and the comparison of known signatures of a person with other signatures claimed to be forgeries; and that he was qualified to testify as to such matters; that he had examined the signatures of James W. Love, which were identified as being his true signatures and the other signatures which the appellees claimed were the true signatures of J. W. Love on the note in question; that in his opinion, it was not the true and genuine signature of James W. Love, but a forgery.

George F. Weber testified that he lived in Joliet, Illinois, and was a bank teller for quite a number of years; that James W. Love, in his lifetime, was a customer of his bank, and

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that he knew the signature of the said James W. Love; that recently he refreshed his memory by looking at the signature cards filed by James W. Love, that were still on file in the court; that in his opinion, the signature of J. W. Love on Defendant's Exhibit 1, is not the true and genuine signature of James W. Love.

Several witnesses for the defendants said they were present at a meeting where Harry W. Love and other creditors were discussing Harry W. Love's business; that Love stated that the trust deed was given to protect the property so that it would not be taken away from him. Love denied any such conversation took place.

Henry E. Pratt of Peoria, Illinois, was called as a witness and testified that he had been assistant state attorney of Peoria County for eight years; that he knew Charles Gullett of Peoria, Illinois, and had known him for nineteen or twenty years; that in 1931, he (Pratt) was state attorney of Peoria County; that Charles Gullett in the months of March and April consulted him about the support and maintenance of himself, and stated he had no means of support; that as a result of such consultation in the first part of May 1931, he filed a petition in the County Court of said County, against Harry H. Gullett, Thelma Gullett and Mrs. Vera Love, a sister of Harry Gullett, and the wife of Harry W. Love, alleging that Charles Gullett is a poor person and unable to earn a livelihood, and that his children were able financially, to support him, and prayed that they might be summoned to appear in court and answer the complaint; that prior to the filing of the petition, he had written a letter to each of Charles Gullett's children, requesting that they make arrangement to care for their father, but hearing nothing from them, he filed the petition.

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For a better understanding of the various transactions, reference is made to the following: October 24, 1921, note to Harry W. Love; Harry W. Love to J. H. Gullett; February 21, 1925, Harry W. Love to J. H. Gullett; July 16, 1931, note to Harry W. Love; July 16, 1931, note to Harry W. Love; the first part of May 1931, note to Harry W. Love; May 5, 1931, the State's Attorney of Cook County, Illinois, filed his petition for citation to compel the production of the notes of Gullett to contribute to their Father's support; August 1931, Charles L. Gullett died; Love May 21, 1931, Harry W. Love executed the trust deed on notes to William L. Gullett for \$10,000.00; James W. Love died March 17, 1932. On May 1, 1933, the judgment against Harry W. Love was entered; May 31, 1933, the complaint was filed in the present suit.

The case was tried before the Circuit Court of Cook County, Illinois, and found that fraud had not been proven, so as to vitiate the transaction, and entered a decree accordingly, dismissing the suit for want of equity. It is from this action of the court, that this appeal is prosecuted.

It is seriously insisted by the appellants that there is adequate consideration for the trust deed in question, and that Harry W. Love was indebted to Harry L. Gullett in the amount of approximately \$10,000.00, and under the law if he cared to do so, he could favor one creditor over another; that the appellants have failed to show any fraud in the transaction, therefore the court properly held that the suit could not be maintained. It is difficult

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to procure positive evidence of fraud in the particular case, as the transactions are usually secret so that circumstantial evidence which tends to prove fraud has always been held to be admissible as evidence. In the case of *Sturges v. Bridgman*, 11 164 Ill. at 111, the court in discussing the matter reviewed some of the earlier decisions and have this to say: "While it is an established rule of law that fraud is never presumed, but must be proven by the party alleging it, yet such proof need not necessarily consist of direct evidence. It may be shown by proof of attending facts and circumstances which raise the inference of fraud. (*Deer v. Deer*, 145 Ill. 21; *Frankell v. McQueen*, 123 id. 253.) In the case of *Lynch v. McQueen*, 51 Ill. 324, it was said by the court in the opinion (p. 327): "It is urged that fraud must be proved, and not inferred. This is true, but, like all other facts, it may be proved by circumstances. We should seldom, if ever, expect to prove fraud by the admissions of a party, nor should we expect to find direct and positive evidence of the fact. Whatever circumstances, when proven, convince the mind that the fraud charged has been perpetrated, is all that is required. (*Tulloch v. Barrett*, 49 Ill. 62; *Gray v. St. John*, 35 id. 222; *Holes v. Hannon*, 32 id. 130.) While fraud cannot be established by circumstances that merely raise a suspicion, yet when they are so strong as to produce conviction of the truth of the charge, although there may remain some doubt, then it is proved. This is believed to be the extent of the rule that fraud must be proved. Any other application of the rule would render it impracticable and useless. If it cannot have the force we have given it, and stand, then the demands of justice would require its abrogation. If it must prevail, and

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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none but positive evidence and prove fraud, it would not only promote, but it would aid in accomplishing, the same. For such never can be the scope or effect of the law.

"Transactions tainted with fraud, and which are, in effect, for the purpose of defrauding others, are generally secret in their nature. They are conducted in a secret and in its nature unlawful, and their various details and particulars are not to be concealed from the public. Such fraudulent transactions are not susceptible of the same direct and positive proof as other facts, and therefore the wise policy of the law provides that they may be so shown by proof of such circumstances from the existence of which the inference of fraud is presumed." *Illinois Lumber Company vs. Goodman* 252 Ill. 103; *Gray vs. Johnson* 135 Ill. at Page 437.

It will be observed from the testimony in this case that the parties to the deed of trust, and deeds to the property in question, were members of the same family. Harry J. Love's wife is the sister of Harry J. Gullett. Courts will scrutinize more closely a transaction when it is between members of a family, than between strangers. In *Bartel vs. Silverman* 233 Ill. App. 154 it is said; "It is the established rule of law in this state that a debtor may prefer a creditor or creditors and that such preference is valid notwithstanding the claims of other creditors, provided the debt preferred is actual and the property transferred does not greatly exceed the amount of the claim and that the transaction is not a mere device to secure an advantage to the debtor or to hinder, delay or defraud other creditors. This rule applies to members of a family, but where an immediate member of a family is preferred as a creditor there must be clear and satisfactory

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proof of a valid and subsisting debt due to the creditor, and payment exacted from the debtor. (Hanson v. Smith, 131 Ill. 2d 317; 131 Ill. 2d 317. Matelkoffer, 162 Ill. 635.) The evidence in this case is related to each other by facts and circumstances which, if established from the evidence, the facts and circumstances properly be considered in connection with the evidence to impeach the transaction. (Sawyer v. Sawyer, 172 Ill. 2d 317.) Intent to defraud is sometimes a question of fact, and of the parties in connection with other evidence. (Hanson v. Smith, 131 Ill. 2d 317.)

The photo-static copies of the transaction, James J. Love, and of the purported signature of J. J. Love on the note admitted in evidence, have been certified to this court for our examination. Mr. Gullett and George B. Gullett testified positively that in their opinion, the writing on the note is not the true signature of James J. Love. After reading the testimony of the various witnesses, and having examined this matter, it is our conclusion that the signature of J. J. Love on the note is not the true signature of James J. Love. It seems strange that the fact that three witnesses testified that they saw James J. Love sign this paper, but the facts and circumstances in evidence strongly tend to prove otherwise. It seems strange that shortly before the trial, Mr. Gullett would destroy his records of the various transactions. He testified that at one time he loaned Mr. Love \$2800.00, other evidence tended to show it was only \$1800.00. (What was done with the \$2800.00 is not disclosed by the record.) Mr. Gullett testified that his father made him a present of the \$4800.00 note the first part of May 1931. It is difficult for this court to understand why, Charles B. Gullett,

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Harry's father, had just prior to his death, consulted the father's Attorney and alleged that he was advised, by the Attorney, that it was not to be brought into court publicly and leave the father's name on it to help support and maintain his credit, or that it was better to let the suit be pending, when this was a grant of \$100,000.00 to the father \$100.00 together with past he later died. The father's intention in this circumstance is that in the day that the father died, he left Harry M. Love and his wife to Harry M. Bullett at the father's place he executed a deed back to Harry M. Love for the father's property, and this deed was unrecorded. In connection with the father's action in August 1931, he joined with Harry M. Love and his wife in executing the \$10,000.00 note and trust deed. All the father left Harry M. Love with no property subject to execution. The father attempts to explain this by saying that he was advised by the father to sign the note and trust deed. The father stated and well knew he never advising him to do so, and stated under oath, that he had never seen Harry M. Bullett until he was called in the father's name. We think each of these circumstances tends to show that the father had intent to defraud the creditors of Harry M. Love. The father's circumstances taken together overcome the positive evidence of the appellees that this was a bona fide transaction for good and valuable consideration.

The court erred in not holding that this transaction was void, as to the judgment creditors. The case is reversed and remanded.

Reversed and remanded.





STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and  
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby  
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,  
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said  
Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand nine  
hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 6th day of February, in  
the year of our Lord one thousand nine hundred and forty, within  
and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 I.A. 444<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of said  
Court, in the words and figures following, viz:

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system (1) has solutions for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the condition  $\alpha + \beta = 1$  is satisfied. This condition is also necessary for the existence of solutions of the system (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ .

2. In the second part of the paper, the problem of the existence of solutions of the system (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$  is solved. It is shown that the system (1) has solutions for arbitrary values of the parameters  $\alpha$  and  $\beta$  if and only if the condition  $\alpha + \beta = 1$  is satisfied. This condition is also necessary for the existence of solutions of the system (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ .

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WEL. NO. 9502.

CO., a Corporation,

Plaintiff- loc,

vs.

WEL. NO. 9502. and  
CO., Executors of the Estate  
of JAMES H. WELCH, Deceased, S.  
P. and W. H. H. H. H. H.  
Defendants- plaintiffs.

WEL. NO. 9502.  
Plaintiff- loc,  
H. H. H. H. H.  
Defendants- plaintiffs.

WEL. NO. 9502.

This is the third time this case has been before this court. The first case is reported in Volume 276 111. at 501. The second case is reported in Volume 291 at 524. For an understanding of the pleadings in the case, at the former hearing we quote from our opinion in Volume 291 at 524. On March 28, 1933, appellant instituted this action of assumpsit in the Circuit Court of in above county, to recover upon seven trade acceptances. The declaration alleged that the instruments sued on were drawn by the plaintiff in November, 1930, February, March, June, and October, 1931 for various amounts aggregating \$12,135.37, and thereafter, upon sight, the defendants, styling themselves McCoy Directory Company, through their duly authorized agent, accepted said bills and thereby became liable to pay to the plaintiff the respective amounts according to the tenor and effect



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of the said acceptances. In addition to this special count, a separate paragraph of which declared upon each of the seven trade acceptances, the declaration contained the consolidated common counts. Attached to the declaration were copies of the seven trade acceptances together with an affidavit of claim to the effect that the amount then due the plaintiff, after allowing all just credits, was \$16,500. The defendants each filed the general issue and three special pleas by which they denied joint liability and set up the Statute of frauds and the five-year statute of limitations. These defendants also each filed a fourth special plea in which it was alleged that the McCoy Directory Company was a common law trust, that the plaintiff knew it was, that there was a provision in the trust agreement which stipulated that the trustees would not be liable personally for any obligations incurred in said trust, of which provision plaintiff had knowledge, and that as knowing plaintiff had its dealings with the McCoy Directory Company and no personal dealings with the defendants. In addition to these pleas, the defendants, Pedderson and McCoy, each filed a plea denying that he ever became a trustee under the trust agreement of the McCoy Directory Company, a trust. To these pleas replications were filed and issue joined.

On December 21, 1933, by leave of court, plaintiff filed an additional count to the declaration. This count set out in haec verba a trust agreement, dated August 3, 1921, creating the McCoy Directory Company, and alleged that the defendant Carlin and the other trustees named therein, Reuben H. Donnelly and Harry M. Johnson, accepted the trusts thereby imposed and thereafter carried on the business of the Company in the name of McCoy Directory

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Company until the death of Donnelly and Johnson, which occurred prior to 1929, that the defendants Henry and Anderson were appointed managing trustees to fill the vacancies caused by the deaths of Donnelly and Johnson, and that they until their deaths out the years 1929, 1930, 1931 and 1932 conducted the business of the trust under the name of Henry Directory Company. That at the request of the defendants, the plaintiff, in 1930 and 1931, printed various city directories. That the specifications and prices for printing the same were originally agreed upon prior to the formation of the trust and later modified in accordance with an unsigned memorandum set forth in this count. In this additional count it was further alleged that in said contract with the plaintiff the defendants did not stipulate or require that they should not be personally liable to the plaintiff or that the plaintiff was to look solely to the trust for compensation, and that the plaintiff did not agree or stipulate with the defendants not to hold them personally liable or to look to the trust estate for compensation. Copies of invoices rendered defendants by the plaintiff and a statement of the account sued on were attached to this additional count. On February 17, 1934 the trial court sustained a demurrer to this additional count and entered an order dismissing said additional count. From that order an appeal was prosecuted to this court and this court reversed the order of the trial court and remanded the cause with directions to overrule the demurrer. Review Printing & Stationery Co. v. McCoy, 276 Ill. App. 580.

"Upon the cause being redocketed in the trial court, the demurrer to the additional count was overruled and the defendant

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Carlin filed three more pleas and a counterclaim. By an order thereafter entered these pleas and counterclaims were adopted as the pleas and counterclaims of the other defendants. The first plea was verified and to the effect that the defendant did not promise in manner and form as the plaintiff alleged to that him. The second plea was the five-year statute of limitations, and the third, a plea of the statute of frauds. Replies as to these pleas were thereafter filed. By the counterclaim it was averred that if the defendant was personally liable to the plaintiff that then the McCoy Directory Company overpaid the plaintiff in the sum of \$2,000 and that the plaintiff therefore owes the defendant and the other trustees said sum. The plaintiff then, by leave of court, withdrew its replications to the fourth special plea of the defendants which had been filed prior to the first appeal, and filed a demurrer to this special plea. The defendants confessed this demurrer and took leave to file amended special pleas within 20 days. Amended special pleas were not filed in accordance with this leave, but on April 13, 1935 it was stipulated that the pleadings and proceedings thereafter should be had under the Civil Practice Act. On April 24, 1935 the defendants filed their answer which made, as a part thereof, the pleas theretofore filed by them. By this answer they admitted the execution of the trust agreement dated August 3, 1921 but denied that either the original trustees or the defendants embarked upon and thereafter continued to carry on the business of the McCoy Directory Company, denied the various allegations of the additional count relative to the plaintiff furnishing materials and printing and the delivery of the city directories for distribution by the defendants as stated in said additional count and denied that they or



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anyone authorized by them had contracted for such directoriex, denied receiving and accepting the same, denied individual and joint liability and alleged that at the time of the formation of the trust the plaintiff was advised and informed of the said trust and all provisions of the trust instrument, that it was understood and agreed that the plaintiff would deal with said trust and would look solely to the trust property for reimbursement for any dealings it had with the trust and would not hold or attempt to hold the trustees in said trust personally liable and concluded that by reason thereof the plaintiff is estopped to attempt to hold the defendants personally liable in this proceeding for said debt. On June 18, 1935 the defendants, McCoy and Pedderson, filed by leave of court, an additional answer in which they averred that all of the several supposed promises in the declaration mentioned and in the trust agreement set forth were not to be performed within one year of the making thereof and were not in writing signed by either of these defendants as required by the statute of frauds. On June 26, 1935 plaintiff filed an answer to the counterclaim denying that it was indebted to the defendants in any amount and averring that none of the defendants had any legal or just counterclaim or set-off against the amount claimed to be due the plaintiff. With the pleadings in this condition, the cause came on for trial before the court and jury. At the conclusion of the evidence on the part of the plaintiff, the trial court directed a verdict for the defendants, upon which judgment was rendered and the plaintiff has again appealed.



"After the cause was reinstated in the trial court after our former decision, counsel for both parties requested the true condition of the record. Counsel for the plaintiff asked and obtained leave to withdraw its declaration to the court and special plea of the defendants to the original declaration and filed a demurrer to said pleas. Counsel for defendants answered said demurrer and took leave to file amended special pleas within 20 days thereafter. The original declaration, which consisted of a special count and three general counts together with the pleas and replications thereto, was a part of the record after the cause was reinstated, and was so treated by counsel and the trial court and the cause went to trial upon the issues made by the allegations of the special count upon the trade acceptances, the common counts, the verified general issues, the allegations of the special pleas, replications and the answer of the defendant filed April 15, 1915.

"The additional count averred and the answer admitted the execution of a written agreement and declaration of trust by Reuben M. Donnelly, Harry A. Johnson, John W. Gamlin, Mary A. McCoy, Mary M. McCoy and Walter A. Frost on August 3, 1911. This instrument was offered and admitted in evidence and by its provisions Mary A. McCoy, Mary M. McCoy and Walter A. Frost were referred to as subscribers and they appointed Donnelly, Johnson and Gamlin trustees. It was provided that the trustees should be known as and use the name of McCoy Directory Company, unincorporated, and under that name and style the trustees were to transact the business as provided in said instrument. This declaration of trust recited that Mary A. McCoy at that time owned a certain business together with certain personal property,

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furniture, plats, records, accounts, bills receivable, directories and data therefor, known as the Foley Directory Company located at Rockford, Illinois; that Walter A. Frost on that day purchased a nine-tenths interest therein and Mary A. Foley had rendered various services to said business; that for a valuable consideration the instrument evidences that Mary A. Foley sold to herself, Johnson and Camlin all the properties and business of the Foley Directory Company and they accepted the same on agreement to manage, carry on and control the business and distribute the profits as therein provided. Section 17 of the trust agreement provided that no one of said trustees should be personally liable for any of the acts of the trustees or of any one of them, and in the administration of the trust, the trustees should not be under personal obligation or liability of any kind, for any accident, mistake or want of judgment other than wilful misuse or abuse of said trust. Section 19 provides that the death of any trustee shall not limit or affect the continuing of the trust and should a vacancy occur in said trusteeship then the remaining trustee or trustees should have the power to fill such vacancy. Section 20 provides that every one having any transaction with the trustees are put on notice that the trustees or their successors in the trust and the subscribers hereto and beneficiaries therein are in no way personally liable for any of the transactions of the trust. "It is further provided that in all contracts and agreements entered into by the trustees for the said trust, specific mention shall be made therein of this trust, to the end that any and all parties must look solely to the trust estate and the trust funds for any claim arising under said trust." Section 22 provided that in June, 1923 and every two years

1. *Journal of the American Medical Association*, 1997; 278: 1019-1024.

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thereafter the trustees should call a meeting of all the holders of the beneficial interests therein and at such meetings the holders of four-fifths of the beneficial interests of the trust may, by vote, require the resignation of any trustee and elect another trustee in his place. The instrument further recited how the profits should be divided and to whom they should be distributed after the death of Mary J. McCoy, the creator of the trust and provided that the trust should continue during the life of the last survivor of the persons named therein and 20 years thereafter, at which time the trustees should close the business, and make distribution of the proceeds thereof as therein provided."

After the case was remanded on the second appeal, the defendant, John H. Carlin, died. His executors were substituted as parties defendants. They filed a long answer denying the material allegations of the various counts of plaintiff's petition. They alleged that plaintiff had knowledge of the terms of the trust agreements, and contracted with the understanding that none of the said trustees should be personally liable. They claimed a set-off and denied that John C. Carlin was ever a managing trustee. The other defendants adopted this same answer, and the defendant, Pedderson added a denial that he ever accepted the position and obligation of trustee. He further answered, that if a contract was entered into with the plaintiff, it was with the distinct understanding and agreement, or implied that plaintiff would look to the trust estate solely, and not to him for payment. The defendant, McCoy, made the same answer. "The plaintiff's reply, in substance, is that the trustees managed and controlled the McCoy



Directory Co.; that Frost was their authorized agent and servant; that his acts bound the trustees personally; that the trustees did not contract against liability, and, therefore, <sup>are</sup> liable personally to the plaintiff."

The case was tried before the court without a jury, the court found the issues in favor of the plaintiff, and rendered judgment in its favor for \$21,156.99. It is from that judgment, that the defendant has again prosecuted an appeal to this court. In each of our former opinions we stated that, "The trust agreement of August 3, 1921, among other things provided that in all contracts entered into by the trustees, specific notice shall be made therein of the trust, to the end that all parties must look solely to the trust estate and trust funds for any claim arising under said trust. By this provision the trustees were given the power to release themselves from personal liability but in order to do so the trustees must stipulate to that effect in their contracts with a third person. In order therefore for appellees not to be liable upon the contract, which forms the basis of this suit, appellees must have stipulated that they were not to be personally responsible, but that appellant, (now appellee,) was to look solely to the trust estate." That which we stated in the former opinions, to be the law, we re-affirm. The law, as there stated, is the law applicable to this case, and is binding on all parties to the present litigation. It must be accepted as the law governing the case. (Tribune Company vs. Emery Motor Livery Company 330 Ill. 537.)

The appellants have seen fit to file separate briefs and arguments, and in both briefs it is strenuously argued that the proceeding in question should be governed by the Negotiable Instrument Act, and therefore the trustees could not be held personally

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liable. We see no merit in this contention and we think the trial court properly held that the case was not covered, in any matter, by the Negotiable Instrument Act.

The appellee made a motion to strike certain portions of the record and abstract, and to tax the cost of additional abstract to appellant. This motion was taken with the case. After consideration of the motion to strike portions of the record and abstract, we think that the motion should be sustained, and the parts mentioned in the petition in hereby ordered stricken. As to that part of the motion to tax the cost of the additional abstract against the appellant, the motion is sustained and the same is ordered so taxed.

The appellant contends that the trial court erred in the admission of certain evidence and rejection of evidence offered in behalf of the defendant. We think that the Court's ruling on the evidence was proper, and not prejudicial to either side in this litigation.

All the other questions of law that are applicable to this case, have been decided in our former opinions so that the only things for this court to decide, are whether the trial court erred in finding that Walter E. Frost was authorized to represent the defendants, and to bind them by entering into contracts with the plaintiff, and secondly, whether any or all of the defendants have shown that they had stipulated or contracted against personal liability. The trial court found that Frost did have authority to bind them and the defendants had failed to prove that they contracted, or stipulated against personal liability, and entered judgment against them. Unless the Court's finding is manifestly against the weight of the evidence, this court will not reverse that finding.

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The appellant insists that it is not shown from the evidence in the case, that Walter Frost had authority to represent the McCoy Directory Company, nor the trustees, as a trustee in one, and especially the appellants, so that they will be liable for the debts so contracted. The evidence shows that Mr. Frost conducted practically the entire business of the McCoy Directory Company from the time the trust agreement was drawn, down to the time of the dissolution of the trust. The evidence also shows that all the trustees knew that this was being done; that the acts of Frost were acquiesced in by the trustees; that they knew he had signed trade acceptances and delivered them to the plaintiff on numerous other occasions, and from the funds of the McCoy Company, paid these various bills. Mr. Hedderson, in his testimony, says that from the time he was appointed trustee in 1901, until the date of the dissolution of the trust, Mr. Frost was in the active management of the business, and there had been no change in the conduct of the same. Mr. Hedderson also stated in his testimony relative to a meeting where he, Mr. McCoy, Mr. Huston and Mr. Frost were present; "That anything that was done would have to be done with Walter Frost, that he is the whole situation." Mr. Huston had knowledge of all of these things, and had been the one that carried on the business with McCoy Directory Company for ten years or more, and had always dealt directly with Mr. Frost. From all of these facts, it is clearly shown that the trustees held out to the public generally, and especially to Mr. Huston and his Company, that Walter Frost was the authorized agent to carry on the business for the Directory Company. In the case of *Merchants National Bank vs. Nichols* 223 Ill. 41, the law is stated

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to be, "A principal may be bound to the extent of the apparent authority which he has conferred upon his agent, but that is because he has held the agent out to the public as possessing the power which the agent exercises. In such a case the principal may bind himself by causing others to believe the powers of the agent to be greater than those actually conferred, but the acts which amount to such representations of the agent's authority must be known to the party setting them up if he intends to avail himself of them."

In *Harvard Oil Co. vs. W. J. Express Co.*, 265 Ill. 182, we find the following: "The question was whether the persons who made the indorsements had apparent authority to make them as agent of the plaintiff, and it was held that if the course of dealing between the agent and third persons was such as to justify them in believing that he possessed the requisite authority the plaintiff would be estopped from disputing it. But is a well established doctrine of agency. If one permits another to clothe himself or to be clothed with apparent authority to act as his agent, any person who has been induced to rely and act upon the appearance of authority can invoke the estoppel."

The trial court found that the appellant failed to establish that they had contracted in such manner, as to relieve themselves of being personally responsible for the payment of these bills. The appellant, in attempting to show this finding is erroneous, relies chiefly upon the testimony of Mr. Anderson, and his version of the conversation that took place at a meeting, where he,

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Mr. McCoy, Mr. Frost and Mr. Weston were present. The witnesses differ as to what was said and done at this meeting. Mr. Pedderson's statement of the part of the conversation that is material to this question is as follows: "Now, Mr. Weston, there is nothing here that concerns me. This is a matter that affects most of the Mr. McCoy family are trying to work out this business to make a living here. I have no personal responsibility in the matter, nor am I involved in this case at all; there is no use of my staying here and listening to this discussion any further. I might just as well leave, because whatever you do here, you will have to do it with Walter; he is the whole thing in that situation." Mr. Pedderson now contends that this is notice to Mr. Weston and his Company, that he was not liable financially in any manner, for the printing that had been done, or was to be done later by the Printing Company for the Directory Company. In order to understand what was in the minds of Mr. Pedderson and Mr. Weston, a further examination of the record must be made, so as to ascertain what the parties were talking about when Mr. Pedderson made the above quoted statements. The record shows that Mr. Weston had come to Rockford at the request of Mr. Frost to discuss prices of printing, and that Mr. McCoy and Pedderson were called in to discuss this matter; that after fifteen or twenty minutes discussion in regard to the prices of printing etc., Mr. Pedderson then made the remarks above quoted; that he was not responsible, and that he might just as well leave. The only testimony as tending to corroborate Mr. Pedderson's evidence of his statement is that of Mr. McCoy, one of the other defendants. He testified and gave his version of this conversation and mentioned nothing about Mr. Pedderson denying any responsibility for the printing of the

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directorates. Mr. Maynard then asked the witness the following question: "To refresh your memory, didn't he say that he was not personally liable for any directorates, and didn't say what they did, or words to that effect?" to which the witness replied, "Yes, I believe he made that statement to the best of my recollection, yes." The plaintiff, through his counsel, objected to the question, and the same was overruled. While there is a question-error assigned on the ruling on this objection, it is not timely improper to ask the witness the question in this form. Mr. Huston and Mr. Frost did not recall Mr. Redderson making such a statement. It seems rather strange that if this statement was made, and it related to the personal responsibility of the trustees for the printing of these directorates, that Mr. Maynard did not also disclaim any liability on his part. The trial court found, in its opinion, that the discussion related wholly to the price of printing; and Mr. Redderson disclaimed any responsibility for that part of the business; that there was nothing in the conversation, or after being discussed that would call for a denial of personal liability of Mr. Redderson, or to indicate to Mr. Huston, that such was the intention of Mr. Redderson.

The point is stressed that Mr. Huston, for a good while, had known and understood the legal contents of the trust agreement; that Mr. Frost had furnished Mr. Huston with a copy of the same, and that Mr. Huston took the copy to his attorney and got an opinion as to the personal responsibility of the trustees when appellee was doing printing for the Directory Company. The attorney advised Mr. Huston that the trustees were personally liable for all such contracts, unless they specifically contracted not to be bound personally thereby. It seems to us there is nothing in this contention that would relieve the defendants from contract-

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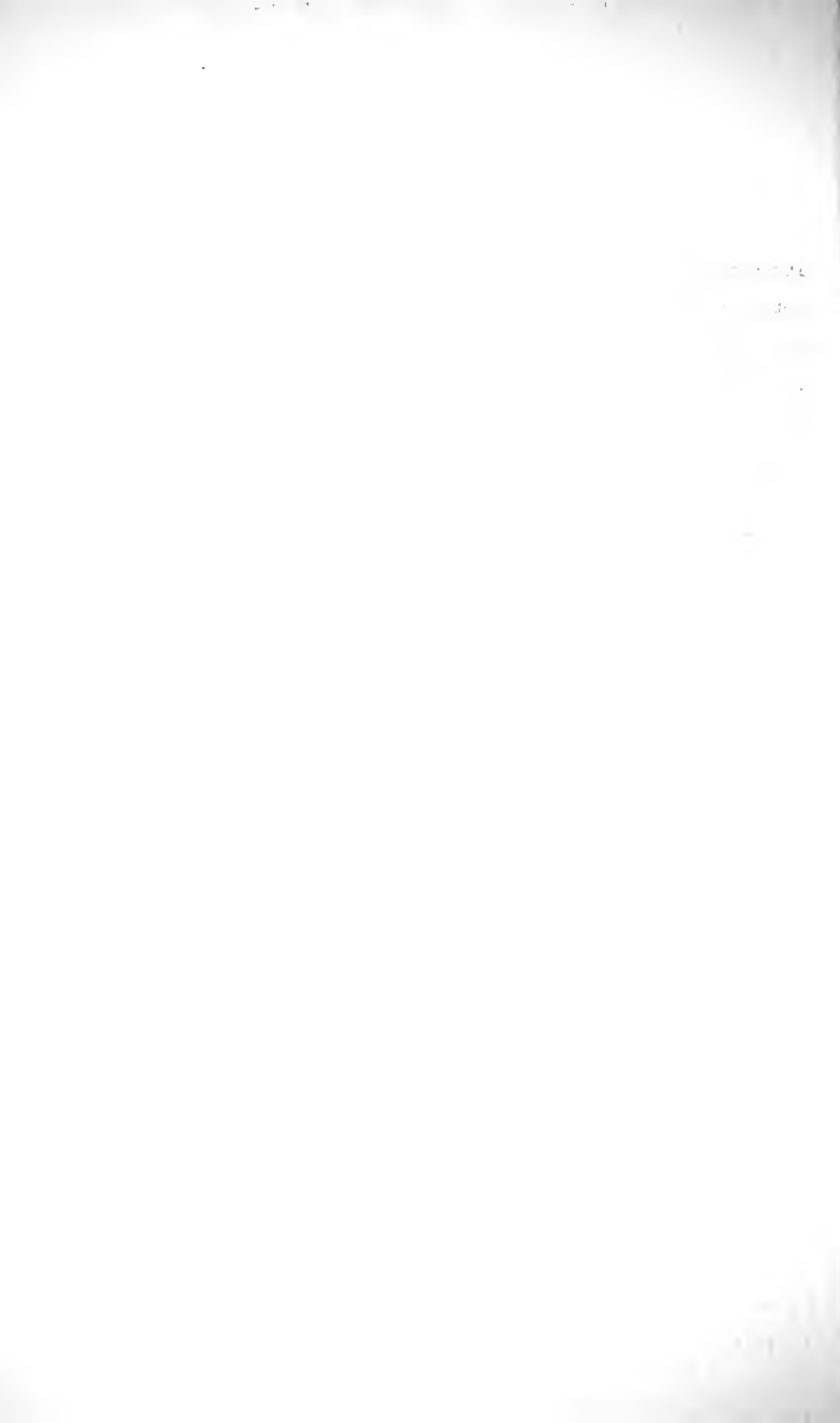
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ing against their own personal liability. The Court should not be barred from its local rights of review. The Court should follow the law and the correct interpretation thereof. The Court should not be in question. The Court should follow the record and the law. The Court should not be barred from holding the trustees personally liable in this case.

It is our conclusion that the trial court properly held that the evidence shows that the trustees were not liable for the contracts in question, and that the defendants have failed to show that they had contracted against their personal liability. The judgment of the trial court is hereby affirmed.

Witness my hand.



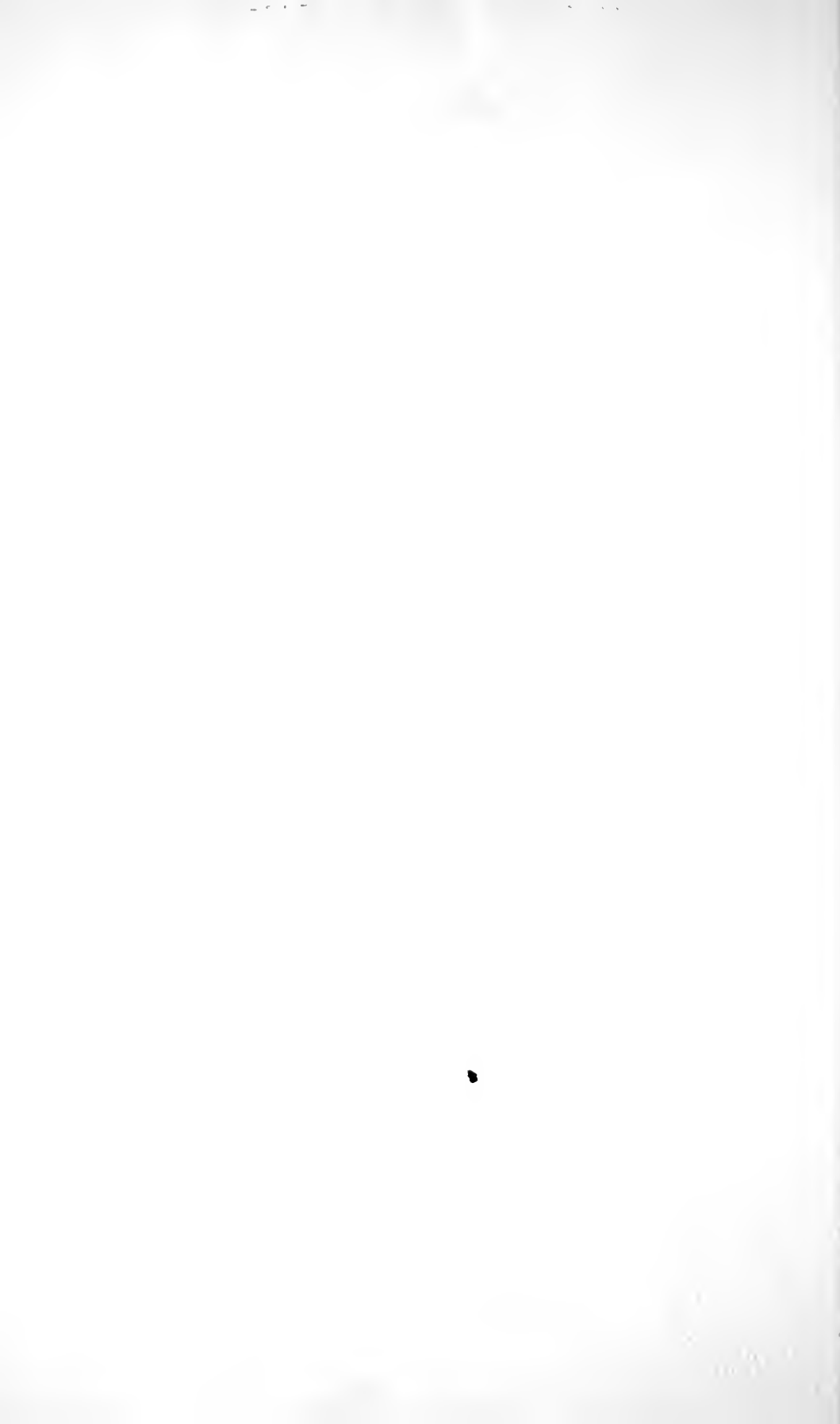
STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

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*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,  
Begun and held at Ottawa, on Tuesday, the 6th day of February, in  
the year of our Lord one thousand nine hundred and forty, within  
and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

303 I.A. 44

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BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of said  
Court, in the words and figures following, viz:



October 11, 1930

WILLIAM J. HENSEL,

Defendant,

vs.

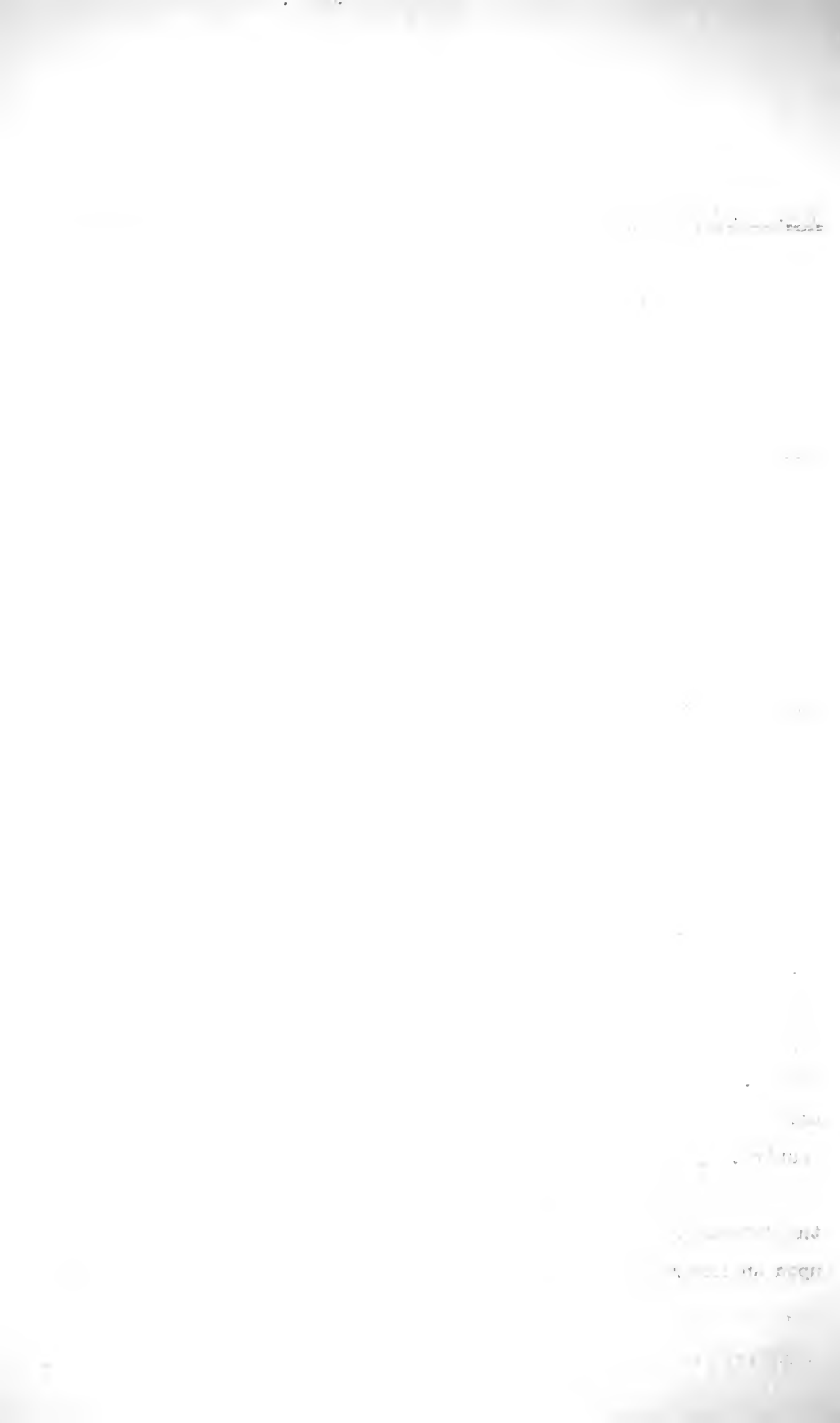
JOHN H. SCHACHTRUP, Plaintiff,  
Insurance Exchange,

Defendant.

WILLIAM J.

On November 9, 1937, Honorable J. Edgar Hoover, Chief of Department in the Circuit Court of Cook County, Illinois, rendered judgment in the Circuit Court of Cook County, Illinois, in the case of Hensel, Administratrix of the estate of Frank J. Potter, deceased, for \$7500.00, which judgment was thereafter affirmed by the Appellate Court in the case of Schachtrop v. Hensel, 295 Ill. App. 303. The facts in the case were that defendant's intestate, Frank J. Potter, was driving an automobile in which Schachtrop was a passenger. There was a collision between the Potter car and another automobile driven by Carl E. Tuttle as a result of which Potter was killed and Schachtrop severely injured. To recover for these injuries this suit was instituted, resulting in the judgment aforesaid.

On January 27, 1930, this suit was filed by Schachtrop against the defendant herein, Union Automobile Indemnity Association, based upon an insurance policy issued by the defendant to Potter and which

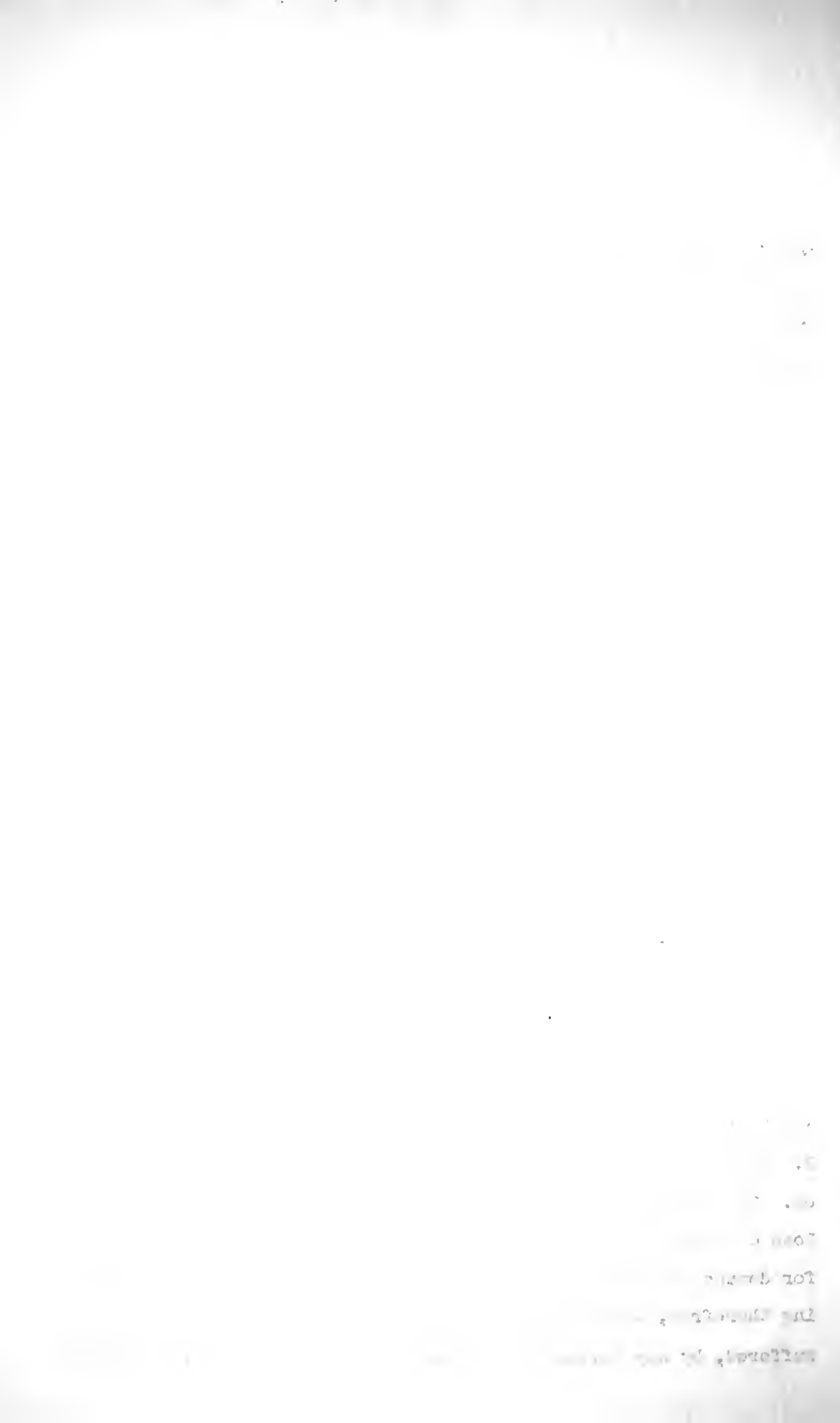




2.

was in force at the time of the collision between the Potter and Tuttle cars. By the provisions of this policy Potter was indemnified against liability for personal injuries caused to him in the operation of his 1930 Ford automobile, No. 2-60-291 to an extent exceeding \$7500.00. The answer of the defendant denied that the car in which the plaintiff was riding at the time he was injured was the car insured by it. After the judgment in the original proceeding had been affirmed by this court, an amended or supplemental complaint was filed setting up that fact. The defendant answered, admitting this fact and alleged that Potter in his application for insurance warranted that there was no lien against the automobile, while in fact it was then subject to an insurance in favor of Joe. F. Bartley for \$50.00; that the policy also provided that if the interest of the insured was not sole and unconditional, the policy became void and alleged that there was a mortgage thereon to Bartley. It was also alleged in the answer that at the time of the collision the insured's interest was not sole and unconditional inasmuch as the insured, after the issuance of the policy, had become a voluntary bankrupt. Portions of this answer were stricken on motion of the plaintiff and the cause proceeded to trial before a jury resulting in a verdict and judgment for \$3033.00 and defendant appeals.

Appellant argues that the evidence discloses that a police at the time he sustained his injuries was in the employ of Frank J. Potter and therefore not covered by the terms of the policy sued on. The provision of the policy referred to is: "Public Liability. Loss of assured from the liability imposed by law upon the assured for damage on account of bodily injuries, including death resulting therefrom, accidentally suffered or alleged to have been suffered, by any person or persons not in the household, employment



or service of the assured, etc." We have read the evidence of Jacob Koren, Melvin Purser and Henry Hodekum as it appears in this record and think the jury were warranted in its finding that appellee was not employed by Potter at the time he was injured. From all the evidence in the record, it is unreasonable to conclude that Potter was endeavoring to induce appellee in the purchase of a farm. For instance the testimony of Henry Hodekum was to the effect that previous to the day of the accident Potter came into appellee's shop several times and talked with him about the purchase of farms and on the day of the accident came in and said he wanted appellee to go with him to look at a farm, that appellee said "No, I haven't time right now, I'm busy", that Potter asked him to go two or three times and finally said: "Come on and go, see this farm and I will pay you for your time and trouble". We do not think it was error for the court to permit appellee to amend his complaint on April 1, 1939, alleging that he was not of the household, nor in the employment or service of Potter at the time he was injured. Appellant filed its answer to this amendment, denying the allegations thereof. Section 46 of the Illinois Civil Practice Act authorized the court to grant leave to go ahead.

Counsel for appellant next insists that the evidence does not show that the car which Potter was driving at the time of the collision was the one covered by appellant's policy of insurance. The evidence is that appellant insured Potter's 1930 Ford coach No. 2-800-291 and that Potter owned a Ford 1930 coach from 1930 up to the time of the accident, owned it on the day of the accident, and it was the only car he owned and was the car involved in the accident. The number appearing in the policy appeared on

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the frame of the car involved in the collision but the number on the motor of the car was 51-353. The reason for this was explained by the witnesses Omer Burton,illard and J. H. "our" nase, who testified to the effect that a reconditioned motor had been put in the latter car.

It is also insisted that the court erroneously stated appellant's motion and struck certain portions of appellee's amended answer. In one such paragraph it was alleged that in the trial of the original suit between appellee and Potter's administratrix appellee "offered the testimony of one [redacted] of the admission of responsibility by the assured [redacted] Potter". This allegation was a conclusion of the pleader. No facts were alleged from which such a conclusion could be drawn. If appellant had a defense based upon a failure of Potter to cooperate with appellee contrary to the provisions of the policy, appellant could have properly pleaded that fact and then offered evidence to support its pleading. The other paragraphs of the answer to which the court sustained appellee's motion to strike set forth representations as to the condition of the insured's title and were not material to the risk so far as the liability feature of this policy was concerned. Furthermore, these paragraphs of the answer do not contain any averments to the effect that appellant was in any way prejudiced by these alleged misstatements or that they in any way affected the risk which the policy insured. The paragraph of the answer alleging the bankruptcy of Potter and nothing more was clearly insufficient.

It is finally insisted by appellant that appellee in the instant case failed to prove that the judgment which he obtained

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in the original suit arose out of an automobile accident and that there was an absolute failure to show that appellee had secured a final judgment as a basis for bringing this suit. Under the pleadings and evidence found in this record, there is no merit in this contention. The judgment was offered and admitted in evidence and read to the jury, and in addition appellee testified without objection as follows: "I knew Frank J. Potter for many years, and that he owned an automobile. I was with him on April 6th in Mr. Potter's automobile. I was sitting in the front seat on the righthand side. Mr. Potter was sitting behind the wheel. It was a Ford, 1930, model. Sedan coach. I was involved in an automobile accident that day with Mr. Potter. This accident took place about half a mile west of Oklawaha. I left the shop five minutes after four. It happened right close to 5 o'clock. I was injured in the accident. I brought a lawsuit against Mr. Potter as a result of that accident. I was the plaintiff in the action wherein a judgment for \$7,500.00 and costs was rendered in the Circuit Court of Polk County in the case of Herman J. Schachtrup v. Ethel M. Hensel, administratrix of the estate of Frank J. Potter, deceased. I am the plaintiff in this case." There was also other evidence to the same effect and the pleadings themselves with their admissions almost obviated the necessity of introducing any evidence in this regard.

We would be warranted in affirming this judgment for want of a sufficient abstract. After showing the motion of the defendant to enter judgment notwithstanding the verdict or to grant a new trial and the denial thereof on May 15, 1939, the abstract proceeds as follows:





- "113 Notice of appeal
- 116 Receipts for trial court record, filed May 23, 1939
- 120 Appeal bond in the amount of \$25,000, filed by  
the Union Automobile Liability Association and  
Central Surety and Insurance Corporation of Kansas  
City approved and filed on the 22 day of June, 1939.
- 122 Power of attorney, authorizing the filing of the bond.
- 126 Financial statement of the bonding company.
- 129 Report of Proceedings."

Where the notice of appeal was filed, when it was filed, who filed it, what it contains and whether notice of appeal was ever served on plaintiff or his counsel does not appear, other steps required to be affirmatively shown by the abstract do not appear. *Stevenson v. Illinois State Trust Co.*, 292 Ill. App. 531. *Wright v. Estate of Giroux*, 294 Ill. App. 550.

There is no reversible error in this record and the judgment of the Circuit Court of Deoria County will be affirmed.

JAMES H. WYATT, J.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



40791

METROPOLITAN CASUALTY INSURANCE  
COMPANY, a corporation,

v.

A. L. DEDI, trading as A. L. DEDI  
SALES COMPANY,

Plaintiff,

Defendant.

WILLIAM

CHIEF JUSTICE.

MR. PRESIDING JUDGE

OF THE COURT.

303 I.A. 349

Plaintiff Metropolitan Casualty Insurance Company, a corporation, brings this appeal from a finding and judgment entered in the County Court in favor of defendant and against the plaintiff.

The action was one in assumpsit for the recovery of certain bond premiums on two surety bonds on which plaintiff bound itself with the City of Chicago, as required by ordinance, when two driveways were constructed on the premises owned by defendant at 2571 and 2537 West Lake Street.

It appears from the evidence that A. L. Dedi Sales Company is a corporation and that A. L. Dedi is the president thereof; that A. L. Dedi Sales Company, by A. L. Dedi signed the two applications for the bonds for a period of five years each for two driveway licenses, said driveways to be constructed over a sidewalk at 2571 West Lake Street and 2537 West Lake Street, Chicago, Illinois; that this suit is brought for the recovery of certain bond premiums amounting to \$10 per year for the use of said bonds and in addition thereto \$8.50 as attorney's fees.

We find no new principle of law herein involved and we are of the opinion that the trial court arrived at a proper conclusion.

For the reasons herein given the judgment of the County Court is hereby affirmed.

JUDGMENT AFFIRMED.

HEGEL AND BURKE, JJ. CONCUR.



40801

GLOBE PAPER BOX COMPANY, a  
corporation,

v.

UNITED PRESSED PRODUCTS COMPANY, a  
corporation,

Appellant,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

9031 A. 650

MR. PRESIDING JUDGE LEWIS L. HUBBARD, CHIEF OF THE DIVISION  
OF THE COURT.

Plaintiff Globe Paper Box Company bring this appeal from a  
judgment entered in the Municipal Court in favor of defendant,  
United Pressed Products Company, a corporation, for costs. The cause  
was tried before a jury.

Plaintiff brought suit to recover the purchase price of  
certain paper boxes alleged to have been ordered by the defendant,  
part of which were delivered, accepted and paid for by defendant,  
but plaintiff alleges that the defendant company refused to accept or  
pay for the balance. Suit was brought for \$2,158.76, representing  
the contract price of the unaccepted boxes.

Defendant denied that it ordered the boxes and apparently the  
jury believed the defense offered.

There is some claim made here that inflammatory remarks were  
made in the presence of the jury in the opening statement made by  
counsel for defendant and a motion was made by plaintiff's counsel  
to withdraw a juror. The same motion, however, asked the court to  
reserve its ruling, which was done. Counsel cannot now complain  
since he asked that the court's ruling be reserved.

From a review of the record we do not find sufficient error  
as would warrant a reversal of the judgment. Therefore, the judgment  
of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

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40859

HENRY D. KLOPFER,  
(Plaintiff) Appellant,

CARL PETERSON,  
(Defendant) Appellee,

HENRY D. KLOPFER,  
Appellant.

FILED FROM

CRIMINAL DIVISION

NOV 16 1939

305 L.A. 551

MR. PRESIDING JUSTICE GEORGE A. JOHNSON DELIVERED THE  
OPINION OF THE COURT.

This is a petition for leave to appeal from the order granting a new trial, because of the action of the trial judge in setting aside a verdict of the jury in favor of the plaintiff Henry D. Klopfer for \$500.00 as damages in an assault and battery proceeding, and against the defendant Carl Peterson, and granting a new trial.

It is agreed that the statement of the case by plaintiff is correct. It is substantially as follows:

Henry D. Klopfer, plaintiff, brought an action for assault and battery against Carl Peterson, defendant. Peterson filed a counterclaim for assault and battery and property damage. On May 18, 1939, a trial by jury was commenced, which was adjourned to May 17, 1939, when the trial was resumed and an order entered that the jury return a sealed verdict. On May 18, 1939, a verdict was returned in open court in favor of Klopfer and against Peterson for \$500.00 as damages.

Before the verdict was opened, counsel for defendant, Peterson, stated to the court that some person representing himself to be a court attache had telephoned his client the night before

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and told him that the jury had returned a verdict of \$500.00 against said Peterson. When the sealed verdict was opened and found to be for the sum of \$500.00, the court, without hearing any evidence and particularly, without requiring the attendance of, or interrogating Peterson, the defendant, entered an order setting aside the verdict and granting a new trial. The only reason assigned was counsel's statement that the information as to the verdict against the defendant had come to the defendant's attention before the verdict was returned in open court.

It appears from the briefs that there was a stipulation by counsel and an order providing for a sealed verdict, but it is the contention of the defendant that this did not amount to a waiver of his right to have the jury present in open court upon the reading of the verdict and to poll the jury. Counsel for both parties asked that the jury be polled and the court sent for the six jurors, but only four reappeared.

The information of the claimed irregularity given by counsel to the court was not under oath. No damage is alleged or shown. While trial courts may exercise reasonable discretion relative to granting new trials, yet, before this is done, it should appear that the complaining party had not had a fair trial in accordance with the law.

As was said in Wheeler v. Shields, 2 Mcannon 348, 351;

"To induce the granting of a new trial, there should be strong probable grounds to believe that the merits of the case have not been fully and fairly tried, and that injustice has been done."

If the granting of a new trial were for reasons having no bearing on the real issues, the same should be made to appear in the record by petition, motion or some such way so such action could be properly and intelligently reviewed. No such record is presented

and told him that the body

was a white female

found to be about 5 feet

and 110 pounds, with

no distinctive

features.

He also said

that the body was

found in a field

near the highway

and that the body

was found on the

side of the road

and that the body

was found in a

field near the

highway and that

the body was found

in a field near

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in this case. We must not be understood as condoning even such oral irregularities, but there is no information before us which would have justified the trial judge in granting a new trial. The information presented as to any claimed irregularity relative to the verdict, was of such a chimerical nature that it was not sufficient to justify the trial judge in ordering a new trial.

For the reasons herein given, the judgment of the Municipal Court is reversed and an order is entered here, which order should have been entered by the Municipal Court, to-wit: Judgment on the verdict for \$500.00 and costs in favor of the plaintiff Klopfer and against the defendant Peterson.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL AND BURKE, JJ. CONCUR.

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40807

MILTON ROSENTHAL,

Appellant,

MICHAEL TAUBER &  
Company, a  
corporation,

Appellee.

APPELLATE COURT

OF THE STATE OF ILLINOIS

OF THIS CO.

NO. 1A. 652

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 2, 1932, S. J. Rosenthal, who was in the wholesale general merchandise business at 180 West Adams Street, Chicago, purchased from the Burlington Blanket Company, (also known as Wis-Gar-Co Clothing Co.) of Burlington, Wisconsin, a lot of overcoats at \$4.75 each, and paid on account the sum of \$7,000.00. On August 22, 1932, Rosenthal gave David Hokin a one-half interest in the deal in consideration of the sum of \$3,500.00. On September 30, 1932, the parties executed the following agreement:

"Memorandum of agreement made this 30th day of September, 1932, by and between S. J. Rosenthal and David Hokin, parties to the first part and Michael Tauber & Company, party of the second part, witnesses that whereas:

"The above mentioned S. J. Rosenthal did on the 2nd day of August 1932 purchase from the Burlington Blanket Company of Burlington, Wisconsin, Seven Thousand (7,000) overcoats more or less at \$4.75 per overcoat and paid on account thereof the sum of Seven Thousand (\$7,000.00) Dollars, and whereas the above mentioned David Hokin purchased one-half interest in said merchandise from said S. J. Rosenthal by payment to him of \$3,500.00, and whereas said David Hokin has paid an additional \$700.00 on account of some of said overcoats delivered to the office of S. J. Rosenthal and whereas the said Burlington Blanket Company did on the 29th day of September 1932, agree to release said S. J. Rosenthal from any obligation to take or pay for certain 446 overcoats generally known as grade number five, and whereas, the said David Hokin and Michael Tauber & Company party of the second part agree to advance the additional funds necessary to pay for said overcoats exclusive of said 446 overcoats above mentioned;

"It is hereby agreed by and between the parties hereto, that said overcoats shall be delivered to Michael Tauber & Company upon the payment of the balance due thereon; the said Michael Tauber & Company shall proceed to sell and dispose of said overcoats in such manner as they may seem best, and that out of the proceeds of the sale of said overcoats said Michael Tauber & Company shall first deduct all monies actually advanced by it in the purchase of said overcoats; second, fifteen (15%) per cent commission for the sale

70804

STATE OF MICHIGAN

IN SENATE,  
JANUARY 10, 1900.

REPORT

OF THE

COMMISSIONER OF THE LAND OFFICE

FOR THE YEAR 1899.

BY

JOHN W. HARRIS,

COMMISSIONER.

LANSING:

W. H. RAY, PRINTERS,  
1899.

THE STATE OF MICHIGAN,  
COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, Clerk of the Court,  
do hereby certify that the foregoing

is a true and correct copy of the  
report of the Commissioner of the Land Office

for the year 1899, as the same appears  
from the records of the Court.

In testimony whereof, I have hereunto  
set my hand and the seal of the Court,

this \_\_\_\_\_ day of \_\_\_\_\_, 1900.

\_\_\_\_\_  
Clerk of the Court.

OVERSEER; account, fifteen (1)



of said merchandise plus the cost of transportation or freight in connection with the bringing in of said overcoats in to the City of Chicago. Third; Out of the remaining monies realized on the sale of said overcoats the said Michael Tauber & Company shall first pay said S. J. Rosenthal the sum of Two Thousand (\$2,000.00) Dollars, then an equivalent amount to said David Hokin; the balance to be divided equally between said S. J. Rosenthal and said David Hokin share and share alike. Fourth; To secure the auctioneer for monies advanced, commission, transportation costs, etc. The auctioneer shall have title to the merchandise described herein and shall have an auctioneer's lien on said merchandise proceeds thereof."

On January 30, 1935, Milton Rosenthal, a son of S. J. Rosenthal, and to whom the claim in suit was duly assigned, filed a statement of claim in the Municipal Court of Chicago, wherein he set out the contract hereinbefore quoted. The statement of claim also recited that S. J. Rosenthal on October 3, 1932, caused to be delivered to defendant 6,087 overcoats, and on October 15, 1932, S. J. Rosenthal delivered to defendant 141 overcoats, making a total of 6,228 overcoats delivered to defendant; that on October 15, 1932, a supplemental agreement was entered into, which reads:

"October 15, 1932.

Michael Tauber & Company  
411-423 S. Market St.,  
Chicago.

Gentlemen:

Referring to contract now in effect with you relative to the sale of overcoats now on your premises, we the undersigned hereby authorize you to proceed to advertise and sell same at public auction.

This letter in substance is a supplement to the contract now in effect between us.

Yours very truly,  
(Signed) S. J. Rosenthal"

that on October 27, 1932, defendant sold at auction 1,585 overcoats and realized therefrom the sum of \$6,701.45; that on October 28, 1932, the following supplemental agreement was entered into between S. J. Rosenthal and defendant:

"October 28, 1932

Michael Tauber & Company,  
411-423 So. Market St.,  
Chicago.

Gentlemen:

Referring to contract now in effect with you

of said material  
connection with  
of Chicago, Ill.  
sale of said  
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company, and  
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said company  
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Michael, and

411-488 So. Market

Chicago.

Gentlemen:

Respectfully,  
Sincerely,  
Very truly,  
Very truly,  
Very truly,

relative to the sale of overcoats now on your premises, and to supplemental contract dated October 15, 1932, we hereby authorize you to place the remaining coats on consignment on the basis of \$5.25 each with whomever you see fit to be sold at retail sale.

Yours very truly,  
(Signed) S. J. Rosenthal

that by virtue of the original agreement and the two supplements thereto, it became the duty of the defendant to sell the remaining 4,643 overcoats at a price of \$5.25 each; that defendant did sell and dispose of the remaining coats and that there was due and owing plaintiff the sum of \$2,140.58, plus interest. Attached to the statement of claim was an itemized statement showing the delivery of 6,087 coats on October 2, 1932, and 141 coats on October 15, 1932, making a total of 6,228 coats; the sale at auction on October 27, 1932, of 1,585 coats; the balance of 4,643 coats to have been sold on consignment at retail at \$5.25 each. The statement debits defendant with \$6,701.45, realized from the sale of 1,585 coats at auction on October 27, 1932, and the sum of \$24,375.75, being the amount due from the sale of the remaining 4,643 coats at \$5.25 each, or a total of \$31,077.20. The statement credits defendant with cash advanced for the purchase of the overcoats of \$1,913.35, drayage of \$221.30 and commission at 15%, or \$4,861.58, a total credit of \$26,796.03. The statement further shows that there was due Rosenthal and Hokin \$4,281.17, and concluded by claiming that there was due to plaintiff as assignee of S. J. Rosenthal, the sum of \$2,000.00, which was to be paid to him first, and one-half of the balance over \$4,000.00, or \$140.58, and he arrived at the figure of \$2,140.58, which he claimed defendant owed. A motion to strike the statement of claim was overruled. Thereupon defendant filed an affidavit of merits. It admits that the parties executed the agreement dated September 30, 1932; admits that it received 6,092 overcoats from S. J. Rosenthal and David Hokin; denies that Rosenthal

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delivered an additional 141 coats, or that it received them; asserts that no supplemental agreements were entered into, but admits the receipt of the letters dated October 15, 1932, and October 28, 1932; admits that it sold at auction on October 27, 1932, 1,585 coats and realized therefrom the sum of \$6,701.45; denies that it was the duty of defendant to sell the coats remaining in its possession at a price of \$5.25, and states that defendant was bound by and acted under the terms of the original agreement; denies that it owed plaintiff the sum of \$2,140.58, or any sum, except that plaintiff might be entitled to the sum of \$131.10 in accordance with the terms of the original contract. The affidavit set out the following statement:

<u>#Coats</u>	<u>Date</u>	<u>Amount</u>
1585	10/27/32	\$6701.45
326	11/4/32 to 1/17/33	1597.50
805	1/20/33 to 5/1/33	3600.00
40	(For Belts)	
1347	11/7/32 to 2/15/33	6674.25
147	11/9/32 to 2/20/33	748.50
257	11/21/32 to 12/21/32	1263.75
15	1/16/33 to 1/24/33	67.50
44	9/14/32 (Taxi coats @ 2.00	132.00
539	9/14/33	1888.60
26	9/20/33	91.00
942	9/14/33 @ 3.62-1/2 Ea.	3414.75
14	9/14/33 3.63-1/2 Ea.	50.75
6087		\$36230.05
	Commission	3934.50
	Cartage-Hebards	221.50
	Funds Advanced	<u>21913.25</u>
		26068.95
		161.10
10/27/32		30.00
		<u>\$131.10</u>

Plaintiff filed a reply and therein asserted that the auction sale took place pursuant to the original agreement and the supplemental agreement dated October 15, 1932; that the parties were bound by and acted under the original agreement and the two supplemental agreements, and stated that it was not advised except by the allegations in the affidavit of merits that the defendant sold the number of coats on

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the dates and in the amounts set forth in the statement. The case was tried before the court and a jury. Plaintiff moved for a judgment on the pleadings, which the court denied. At the close of plaintiff's evidence, defendant moved that the court instruct the jury to find the issues for the defendant. The court did not allow the motion, but did instruct the jury to find against the defendant and to assess plaintiff's damages at the sum of \$131.10. The jury returned the verdict as directed. Plaintiff filed a motion for a new trial, which was overruled, and a judgment was entered on the verdict against the defendant in the sum of \$131.10. This appeal by the plaintiff followed.

While a verdict was returned in favor of plaintiff, in effect it was a directed verdict against plaintiff. A motion to direct a verdict for the defendant preserves for review only a question of law whether from the evidence in favor of the plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. In considering the case, we shall keep that rule before us as a guide. Without pausing to state the evidence in detail, it will suffice for us to say that we have given it careful consideration, and find that it tends to establish the following facts: That on October 15, 1932, S. J. Rosenthal delivered to defendant 141 coats; that on the same day he gave defendant 5 additional coats, for which he did not receive a receipt; that the purpose of the delivery of the 5 additional overcoats was that Rosenthal had promised the 5 overcoats to the men who did the packing and unpacking; that the overcoats in the possession of Rosenthal were not the proper sizes for the men, and therefore, he gave 5 additional overcoats to defendant so that the men could come to the warehouse of defendant and pick out 5 coats from among the other

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coats defendant had; that hence the 5 coats were given by Rosenthal as an exchange for the 5 coats which defendant was to give out to the packers; that the lot of 141 coats was a part of 151 coats sold to Rosenthal by the Burlington Blanket Company on September 21, 1932; that on October 7, 1932, defendant paid to the Burlington Blanket Company the sum of \$21,312.35, which represented the purchase price of 6,087 overcoats at \$4.75 each, less the \$7,000.00 previously paid by Rosenthal; that the 6,087 overcoats paid for to the Burlington Blanket Company and which were shipped directly to defendant, and the 141 coats received on October 15, 1932, represented the total number of coats which came into defendant's custody; that all the coats were sold; that shortly before October 15, 1932, Abe Belosky, vice president of defendant company, telephoned Rosenthal that he wanted an agreement that the coats could be sold at auction; that Rosenthal went to the office of defendant, and that the letter dated October 15, 1932, in duplicate, which had been prepared by defendant, was submitted to him for his signature; that Rosenthal signed both copies of the letter; that he retained one and the other was retained by defendant, and that David Hokin signed the letter later; that the auction sale took place on October 27, 1932; that it was duly advertised, and that it took almost a day to conduct the sale; that the overcoats were divided into approximately 427 lots, and that all of the lots were offered for sale; that 10, 12 or 15 lots were passed because there were no bidders; that at the conclusion of the sale, Abe Belosky advised Rosenthal that the sale was fictitious; that fictitious names had been used in order to raise the price; that Belosky then gave to Rosenthal and his son the fictitious names used at the sale, such as "Halsted" and "Ashland"; that Rosenthal became indignant because of the "dummy sales" and asked for a statement of the bona fide sales; that he told defendant that he would pay it the difference between the

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money taken in at the auction and the money advanced to the Burlington Blanket Company, and that Belosky told him to return in the morning; that on the following morning, October 28, 1932, at defendant's office, Rosenthal and his son were handed a number of orders and a statement showing that the number of garments sold at the auction was 1,673, and that the amount realized was \$7,120.45; that in subsequent adjustments, as indicated by the statement in the affidavit of merits, it appears that only 1,585 overcoats were actually sold at the auction sale, and that only \$6,701.45 was realized; that Rosenthal again informed Belosky that he did not like the methods employed, and that he, Belosky, should figure out the amount of money received and add defendant's commission and expenses, and that plaintiff would refund the money within a couple of days and take the merchandise back; that Belosky then stated that he had a customer to buy the merchandise at \$5.25 a garment, and inquired whether Rosenthal would sell at that price; that Rosenthal said he would; that it was then disclosed that Rosenthal could not get his money right away because the merchandise would have to be placed on consignment; that Belosky stated that it would take a couple of months to dispose of the merchandise on consignment; that Belosky then caused to be prepared, in duplicate, the letter dated October 28, 1932, which he signed; the duplicate was retained by Belosky and was subsequently signed by Hokin; that Hokin, according to the testimony of Belosky, was at defendant's establishment "all the time." For the purpose of establishing that the defendant accepted and acted upon the authorization in the letter of October 28, 1932, plaintiff offered and there was admitted in evidence, testimony that defendant delivered to Paul Weinberg a quantity of overcoats on consignment; that Weinberg operated stores on Halsted Street, Ashland Avenue and Lincoln Avenue, Chicago, and one in Hammond, and that some of the

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coats involved were consigned to these stores and sold on a consignment basis; that the arrangement to sell on consignment was made by Belosky and Weinberg; that defendant held title and Weinberg accounted for the sale to defendant; that the overcoats were being placed on consignment about the first week in November, 1932, and continued until the end of January, 1933, and that defendant still had some coats on hand in January, 1933, and disposed of them; that Weinberg had a written contract with defendant in connection with the overcoats, and that he agreed to pay \$5.25 each; that Weinberg testified in a conversation with Edward J. Turney, Secretary-Treasurer of defendant, Dick Levy, President, and Abe Belosky, Vice President, "they said to have a contract with two parties on these coats, and that they must get five and a quarter for them"; that there were two partners in the deal, Rosenthal and Hokin; that the coats were to be delivered to him on consignment, and that he disposed of about 200 coats. As further proof of acceptance by defendant and its action under the instrument of October 28, 1932, plaintiff offered in evidence an advertisement in the Chicago Tribune of February 12, 1933, and an advertisement inserted by defendant in the Chicago Herald & Examiner of February 11, 1933, which advertisements offered for sale "2500 overcoats and topcoats consigned to us to be sold to the public at \$5.25, choice of any coat in the house. These coats manufactured to sell for \$20.00, \$25.00, \$30.00. Must be sold within 30 days. Michael Trauber & Co., Liquidators." The evidence on behalf of plaintiff further tended to show that on August 25, 1933, Rosenthal wrote defendant requesting samples of the unsold coats. By its letter dated September 5, 1933, defendant declined the request, and for the first time stated that according to its records, "five of these coats were delivered to you on October 31, 1932, as per the enclosed invoice." The invoice dated October 31, 1932, lists five overcoats and shows a charge of \$5.00 each, or a total charge of

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\$30.00. The charge of \$30.00 appears in the statement in the affidavit of merits as of "10/27/32", and operated to reduce the net balance of \$161.10 to \$131.10. On October 18, 1932, defendant transmitted to Rosenthal its check for \$131.10, with an endorsement on the reverse side that the check was in full for all claims. The check was not accepted, and was returned by Rosenthal with a letter dated October 23, 1932, asserting that the "amount is incorrect . . . preposterous and ridiculous".

The position of defendant is that the letters of October 15, 1932, and October 28, 1932, are not binding contracts; that there was only one binding contract, namely, that of September 30, 1932, and that defendant did not violate that contract. Defendant also contends that 141 overcoats were the property of Hokin and not of Rosenthal, and that, therefore, defendant did not owe the plaintiff any duty as to these 141 overcoats. Defendant states that the letter of October 28, 1932, was not accepted by it, that there was no consideration for the letter, and that the contract of September 30, 1932, was unambiguous. Plaintiff insists that he made out a prima facie case, justifying the submission of the issues to the jury. He maintains that the relationship between Rosenthal and the defendant was that of principal and agent, and that upon the disposition by defendant of the 6,228 overcoats, defendant was bound to account for the proceeds realized therefrom. The contract of September 30, 1932, designates the defendant as an auctioneer. Plaintiff argues that with the making of the supplemental agreement, represented by the letter of October 28, 1932, granting authority to place the coats on consignment at retail, the technical relationship of the defendant then changed from that of auctioneer to that of factor. Plaintiff also urges that defendant was a bailee of the 6,228 coats entrusted to it, and could not question the title of Rosenthal.





Directing our attention first to the contention of defendant that plaintiff had no interest in the 141 overcoats, we observe that in the letter from defendant to Rosenthal dated October 27, 1933, the statement is made that inasmuch as the original contract indicated that the 141 coats were purchased and paid for by Hokin, the proceeds of the sale "was accredited to his account by us". There is evidence from which the inference may be drawn that the defendant had received a letter of indemnity from Hokin. We cannot agree with the contention that the mere fact that Hokin paid "an additional \$700.00 on account of some of said overcoats", would give him title to the overcoats to the exclusion of Rosenthal. The evidence supports the contention that all the coats were pooled together by Rosenthal and Hokin. It will be recalled that the agreement recites that "said overcoats shall be delivered to Michael Tauber & Company", that Michael Tauber & Company shall deduct all monies advanced by it, 15% commission, plus freight charges, that out of the remaining monies realized "on the sale of the overcoats the said Michael Tauber & Company shall first pay said S. J. Rosenthal the sum of \$2,000.00." There is nothing in the contract about crediting Hokin with the proceeds of 141 overcoats. We are of the opinion that on the evidence submitted, defendant did not have the right to turn over the proceeds of the 141 overcoats to Hokin, or to fail to account to Rosenthal for the proceeds. If Hokin claims any interest in the proceeds of the 141 overcoats, the law provides appropriate procedure by which he may intervene. We think it immaterial whether we call the defendant a party to a joint venture, an agent, an auctioneer or a bailee. Having received and disposed of the merchandise, it was its duty to account to the plaintiff for the proceeds.

A perusal of the statement filed by the defendant as a part of its affidavit of merits shows that no information is given therein as to the identity of the persons to whom the sales were made subsequent to the auction, their addresses or the price charged per

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garment, except the last two transactions of 942 coats and 14 coats, sold on September 14, 1933, at \$3.62-1/2 each, and the sale of 44 Taxi coats at \$3.00 each on the same date. The statement ignores the obligation of the defendant (as contended by plaintiff), that it was the duty of the plaintiff to dispose of the overcoats on the basis of \$5.35 each. The statement also shows an item of 40 overcoats "for belts" without any amount being received therefor. Plaintiff draws the inference that these 40 coats were the subject of a gift. No credit is given to the plaintiff for the 141 coats received by defendant on October 15, 1932, apparently because defendant considered that it was not obliged to account to plaintiff for these coats. It will also be noted that on October 27, 1932, defendant charged plaintiff with \$30.00 for 5 coats. According to the theory of plaintiff, which is supported by the evidence, these are the 5 coats which were delivered by plaintiff to defendant for the purpose of having defendant exchange the same for the parkers. Under plaintiff's theory, clearly there would be no basis for defendant charging plaintiff with these 5 coats which the parties had agreed to exchange; nor does it appear why plaintiff was charged \$6.00 for each of the coats.

We now turn to consider whether the letter of October 28, 1932, which plaintiff contends represents a supplemental agreement, was accepted by plaintiff, and if so, whether there was valid consideration. We have no hesitancy in saying that the plaintiff made out a strong case of acceptance. The letters of October 15th, 1932, and October 28, 1932, were drafted under the direction of the defendant, and plaintiff was requested by the officers of the defendant to sign them. It is difficult for us to comprehend why the defendant's officers drafted the letters addressed to itself, if it did not intend to accept them. The subsequent conduct of the defendant by acting under the letters, such as holding the auction, putting

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the overcoats out on consignment and advertising the overcoats as having been received on consignment for sale at \$6.25 each, was strong indication of the acceptance of the propositions set out in the letters.

Finally, we are asked to determine whether the amendment to the contract as set out in the letter of October 28, 1932, is supported by sufficient consideration. Defendant argues that there was no consideration for the contract of September 30, 1932, because under the original contract it had the right to sell as it deemed best. Plaintiff replies that the original contract required the defendant to dispose of the overcoats "in such manner as they may deem best", and that the language, considered in connection with the other parts of the document, means in such manner as the parties thereto deem best. Plaintiff also calls our attention to the fact that immediately following the quoted language, there is a provision that "out of the proceeds of the sale of said overcoats, said Michael Hauber & Company shall first deduct all monies actually advanced by it in the purchase of said overcoats." Plaintiff argues that the use of the word "it" after the name of the corporation, indicates that the parties intended that the word "them" meant all of the parties. It will be observed that the original agreement does not say anything about the time of performance or the price at which the overcoats were to be sold. It did contemplate a sale by auction. By the letter of October 28, 1932, considered in connection with the main agreement, the coats were to be sold at retail, were to be delivered on consignment and were to be sold at \$5.25 each. On the previous day the plaintiff had charged defendant with conducting a fictitious auction by the use of "dummies". That circumstance, if true, gave the plaintiff the right to abrogate the contract. The garments were originally

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purchased by Rosenthal at \$4.75 each. By consenting to a sale at \$5.25 each, Rosenthal resigned himself to a loss of approximately 25¢ on each coat because the defendant was still entitled to deduct its commission of 15%, or around 75¢ on each garment; nor was Rosenthal to receive the money sooner than two months. Then, after the auction, Rosenthal demanded the return of the overcoats, the defendant proposed the arrangement set up in the letter of October 28, 1932, and defendant thereby entered into an arrangement whereby it would be assured a substantial commission if the sale of the coats on consignment was concluded. We are convinced that the evidence clearly shows that there was an adequate consideration for the supplemental agreement represented by the letter of October 28, 1932. We are of the opinion that the court was in error in declining to admit the various exhibits offered by plaintiff. The court was also in error in excluding testimony as to the occurrences at the auction sale. This testimony was admissible, not for the purpose of varying the agreement, but for the purpose of showing the circumstances and the object the parties had in view.

Plaintiff made out a prima facie case, and the court was in error in directing a verdict. Plaintiff suggests that we enter judgment in his favor in the sum of \$2,140.58. We are of the opinion that there should be a new trial in which both the plaintiff and defendant will have an opportunity to offer proper evidence bearing on the issues involved. For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions.

JUDGMENT REVERSED AND  
CAUSE REMANDED.

DENIS E. SULLIVAN, P.J. AND HABEL J. BORCUP.

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*Journal of Management Education* 26(7) 809-821

**THE UNIVERSITY OF TEXAS AT AUSTIN**

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J. J. J.

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40903

THE TRUST COMPANY OF CHICAGO, as Administrator  
of the Estate of HERMINA JUSZCZYK, deceased,

Plaintiff - Appellee,

v.

GUY A. RICHARDSON and RALPH J. COE, JR.,  
Receivers, etc. et al., doing business as  
CHICAGO SURFACE LINES,

Defendants - Appellants.

and

FRANK W. FLAMMANG, individually and doing  
business as FRANK W. FLAMMANG MOTOR TRUCKING,  
FRANK DUBOSE, JOSEPH DOUGHERTY and AUGUST  
WOPINSKI,

Defendants.

303 I.A. 652

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is a suit brought under the Injuries Act to recover pecuniary loss alleged to have been sustained by the next of kin of Hermina Juszczyk, by reason of her death as a result of injuries sustained when a collision occurred between a west bound street car on North Avenue, upon which she was a passenger, and an east bound truck, on the afternoon of July 23, 1937. Suit was brought against the Chicago Surface Lines, Frank W. Flammang, individually, and doing business as Frank W. Flammang Motor Trucking, who was the owner of the truck, Frank Dubose, the driver of the truck, Joseph Dougherty, the owner and driver of an automobile which was on the street and August Wopinski, the motorman of the street car. The driver of the truck and the motorman were dismissed, on motion of plaintiff, at the close of the evidence. At the close of all of the evidence, the Chicago Surface Lines presented a motion in writing to direct a verdict finding the defendants not guilty, and presented a written instruction to that effect. The motion and instruction were taken under advisement by the court. The jury returned a verdict finding Joseph Dougherty not guilty, finding the Chicago Surface Lines and

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Frank M. Flammang, individually, and doing business as Frank M. Flammang Motor Trucking, guilty, and assessing damages in the sum of \$7,000.00. Frank M. Flammang, individually, and doing business as Frank M. Flammang Motor Trucking, filed no motion for a new trial and prosecuted no appeal. The Chicago Surface Lines filed a motion for judgment notwithstanding the verdict, and in the alternative, a motion for a new trial, also a motion to set aside the answer to the special interrogatory; "was the driver of the automobile truck guilty of negligence which was the sole cause of the injuries to plaintiff's intestate?" The court denied all of the motions as well as the motion to direct, which had been under advisement, and entered judgment on the verdict. This appeal followed.

Plaintiff's intestate was 19 years of age and in good health, and was employed by Montgomery Ward & Company, earning approximately \$30.00 per week. She also taught English to foreigners during the evenings and thereby earned an additional sum of \$6.00 per week. On July 23, 1937, at about 5 P.M., on her way home from work, she was a passenger on a west bound North Avenue street car, operated by the defendant. North Avenue is an east and west thoroughfare in Chicago, on which two street car tracks are laid, the north track for west bound street cars and the south track for east bound cars. North Avenue is approximately 50 feet wide from curb to curb. The distance from the south curb to the south rail of the east bound street car track is nearly 18 feet. The two tracks occupy a space of nearly 15 feet in the center of the street. The distance from the north rail of the west bound street car track to the north curb is a little over 17 feet. On the north side of the street is located the warehouse of the North Central Terminal Warehouse Company for the purpose of ingress and egress to loading platforms, with a space of 70 feet between them, which has two 50 foot driveways. There is a cross-over switch in the street car tracks, which is 58 feet long, and the western

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end of which is 25 feet east of the east side of the westerly of the two driveways into the terminal. Approximately 160 feet east of the cross-over switch (measured along the west bound street car track) is a double track railroad, which crosses North Avenue diagonally. Kingsbury Street runs northwest and southeast, paralleling the double track railroad which crosses North Avenue, and is east of the railroad. There is a "stop sign" for the west bound street cars at Kingsbury Street. Cherry Street crosses North Avenue 145 feet west of the west end of the cross-over switch. There is a single track railroad on that street. Approximately 50 feet west of Cherry Street is a bridge over the North Branch of the Chicago River. It was a clear summer afternoon and the streets were dry. North Avenue, in the vicinity described, is a straight level street, except that there is an incline from the river bridge to Cherry Street. The west bound street car upon which she was riding, stopped at Kingsbury Street. It started again, crossed the double railroad tracks and proceeded west into the block. A refrigerator truck (being driven by DuBoise) belonging to the defendant Flammang, weighing about 4,000 pounds and carrying 2,000 pounds of freight, was coming east off of the river bridge, just west of Cherry Street, traveling on the right or south side of the street. A Ford automobile driven by Dougherty came out of the west driveway of the North Central Terminal on the north side of the street, stopped at the curb and then proceeded south across the west bound street car track to the east bound street car track, where it turned east, straddling the south rail. When the automobile crossed the west bound street car track and turned east, the west bound street car was from 30 to 100 feet east of it, and the east bound truck was from 50 to 150 feet west of it. The scene of the accident was a busy section of the city, with appreciable traffic. On one side of the street was a warehouse, with many employees leaving at 5 P.M., the hour of the

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3. *Journal of the American Medical Association*, 1990; 263: 1033-1036.

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accident. On the other side of the street was a fish market. There were between 50 and 60 passengers on the street car, including 4 who were on the front platform. Some of the passengers were standing in the aisle. Hermine Juszczyk was sitting on the long seat on the left hand or south side of the street car. At the time of the collision, she was injured and removed from the street car. She died as a result of the injuries inflicted by the collision. There was a collision between the truck and the street car. The left front corner of the street car was smashed. The body of the truck was knocked off the chassis and thrown over on the left side of the Ford automobile. There was no damage done to the rear or any part of the automobile. This took place in the middle of the block at the cross-over switch. The motorman testified that he had his street car under control. Two passengers testified that the street car was going between 25 and 30 miles an hour before the crash, and that the street car stopped about 10 feet after the collision. The driver of the automobile, the driver of the truck and the motorman were the witnesses who had reason to observe and know the speed of the street car. Dougherty, the driver of the automobile, placed the speed of the street car at 15 miles an hour, DuBose, the driver of the truck, at 20 miles an hour, and Kopinski, the motorman, at 6 or 8 miles an hour. However, in a signed statement to the police shortly after the occurrence, in answer to the question: "How fast were you driving at the time of this accident?" he answered, "about 15 miles an hour." On the trial, he stated that at the time he signed the statement, he understood the inquiry was as to his speed before the accident. The truck driver said his truck stopped before the crash, and the motorman testified that the street car stopped before the crash. Obviously, one or both of them was or were mistaken as to this. The speed at which the truck was moving as it came from the bridge is estimated by the witnesses as being all the

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way from 10 to 30 miles an hour. The driver of the truck saw and knew that the street car was coming from the time the street car crossed the Kingsbury Street railroad tracks. The truck swerved from the east bound track over to the west bound track and in front of the street car. The driver of the truck and the motorman were the only witnesses who saw the truck swerve over. The automobile driven by Dougherty had turned east and had traveled 30 feet in that direction at the time of the impact. Hence, Dougherty did not witness the collision. The witnesses who were passengers did not see the truck prior to the crash, nor did the conductor. The motorman testified that the truck swerved to the west bound track when the street car was about 5 feet from it, and that "before you could even take another breath the collision occurred." The truck did not get entirely on the west bound track. The left side of the truck swerved 2 or 3 inches to a foot over the south rail, and then the driver of the truck attempted to pull back to the right, but before he could do so, the collision occurred. When the truck swerved over, the motorman said the street car was 5 feet away. The driver of the truck testified that the street car was 150 to 160 feet away at the time he swerved over into the west bound track. Thereafter, the driver testified that the street car was 35 feet away at the time he swerved into the west bound track. He also testified that "when I turned over there on the wrong side of the street, the street car was practically right on top of me. It was about 35 feet when I first turned over there. Before I could get back out he was right on me." The truck driver also testified that when his truck got over on the west bound track, and the two vehicles were moving toward each other, the street car was coming at a "terrific" speed. He stated that he noticed nothing unusual about the street car moving along on the west bound tracks, and that the street car was going 20



miles an hour when he turned over in front of it. The motorman stated that he had been going 6 to 8 miles an hour, and was slowing down to make a service stop. The truck driver said he tried to pass between the street car and the automobile. Dougherty, the driver of the automobile, said that the front end of the truck was even with his car at the time of the crash, and that the speed of his (Dougherty's) automobile was then 15 miles an hour. The motorman stated the truck was going at a speed of 25 miles an hour when it pulled in front of the street car. There was testimony that the swerving of the truck into the west bound track was done suddenly and without warning. There is evidence that the truck which weighed 4,000 pounds and carried 2,000 pounds of freight, was dragged back by the street car 10 or 12 feet before the street came to a stop. There was a sharp conflict in the testimony of the truck driver and the motorman as to the speed of the vehicles and the respective distances at the time the truck swerved into the west bound track, and also as to whether either or both vehicles stopped before the impact.

Under their first point, appellants urge that the evidence fails to show any actionable negligence on the part of the motorman; that plaintiff has the burden of proving that it has a cause of action under the statute against the street car company; that this is not a res ipsa loquitor case; that negligence will not be presumed; that the collision occurred in the middle of the block, where the street railway company has the right of way superior to other vehicles over that portion of the street occupied by its track; that the law does not require a motorman to operate a street car in continuous anticipation of unusual or extraordinary occurrences; that the speed of the street car had no other effect upon the accident than to cause the street car to be at that particular spot when the truck swerved; that the negligence which caused the crash was committed when the truck suddenly swerved over to the wrong side of the street;



that when the truck swerved, the crash was inevitable, regardless of the speed of the street car, which had nothing to do with causing the truck to swerve, and was not the proximate cause. Plaintiff does not challenge appellants' assertion that this is not a res ipsa loquitor case, nor that the street railway company had the right of way superior to other vehicles over that portion of the street occupied by its track, nor that liability under the injuries act cannot be sustained by mere proof of the collision and fatal injuries. Plaintiff insists that the evidence shows actionable negligence on the part of appellants, which negligence was the proximate cause of the injuries which resulted in the death of decedent. The burden was on plaintiff to establish such negligence by a preponderance of the evidence. Appellants also state that before an alleged act of a defendant may serve as the basis of a cause of action, two things must be shown by the evidence: First, it must be shown to have been negligent, and second, it must be shown that such negligence was the proximate cause of the injury. It is not disputed that the girl who was killed was in the exercise of due care and caution for her own safety at and about the time of the collision. Appellants, as common carriers of passengers, owed to the passengers, including plaintiff's intestate, the duty to do all that human care, vigilance and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the business. Plaintiff argues that the deceased was injured by the combined negligence of both parties, and that the mere fact that the injury would not have happened but for the negligence of the truck driver is not sufficient to exonerate appellants, and that it was for the jury to determine from the evidence whether her injury was the result of the coincidental acts of both parties. Appellants maintain that there is nothing in the circumstances shown by the evidence which would give the motorman any reason for anticipating



that the truck would be suddenly swerved over in an attempt to pass the automobile, which was straddling the south rail of the east bound track, and was about to pass the west bound street car; that one of the most common and frequent incidents of street traffic is the passing of street cars by other vehicles moving in the opposite direction, and unless a motorman in the discharge of his duty toward his passengers, may proceed upon the theory that other vehicles will be driven upon the streets with some reasonable degree of care until he has notice to the contrary, the practical operation of the street cars would be seriously interfered with, if not prevented. They further insist that the speed of the street car did not cause the truck to swerve over and that such speed was no part of the proximate cause. They urge that even when an act has been shown to have constituted negligence, the question of proximate cause remains to be determined. Appellants also urge that the rules for determining proximate cause do not contemplate the degree of care required, and that that question is determined on the same basis and on the same rules in an ordinary care case as it is in a case involving the highest degree of practicable care. These propositions of law are not challenged by plaintiff. In this case we should bear in mind the duty that appellants owed to the passenger. As pointed out, there was a sharp conflict in the testimony of the motorman and the truck driver. Plaintiff introduced evidence which had a tendency to impeach the testimony of the motorman. The truck driver gave two accounts of the occurrence. We are of the opinion that the propositions as to whether there was actionable negligence on the part of the motorman and whether such negligence by itself, or combined with the negligence of the truck driver, was the proximate cause of the collision, were properly left to the jury. The jury resolved the questions in favor of plaintiff, and we do not feel that we should disturb their findings.

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The second criticism leveled at the judgment is that the court erred in granting and refusing certain instructions. Appellants declare that the court erred in giving plaintiff's instruction No. 28, which reads:

"The Court instructs the jury that if the negligence of two or more parties proximately contributes to cause an accident through which a third party is injured, while in the exercise of ordinary care at or before the time of the occurrence, it is not a defense for one of said parties to show that the other was also guilty of negligence which contributed to cause the injury to the third party, if the third party was at and before the time of the happening of the accident, in the exercise of ordinary care."

They urge that this instruction is objectionable, first, because it assumes negligence, and, second, because it is not confined to the negligence charged in the complaint. As to the criticism that the instruction assumes negligence, we are satisfied that when it is read in connection with the other instructions, and particularly with appellants' given instructions Nos. 7, 8, 9, 10, 11 and 12, the jury would understand that negligence was not being presumed. As to the second criticism of the instruction, namely, that the negligence mentioned is not confined to that charged in the complaint, we observe that instruction No. 34, given in behalf of appellants, informed the jury that "the burden of proof is not upon the defendant doing business as Chicago Surface Lines to show that they are not guilty of the specific negligence charged in plaintiff's complaint, but the burden is upon the plaintiff to show that the defendants, Chicago Surface Lines, are guilty of such negligence as so charged in the complaint; and this rule, as to the burden of proof, is binding in law and must govern you in deciding this case. You have no right to disregard said rule, or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict you should adhere strictly to said rule." Appellants also maintain that persistent efforts were made to bring to the attention of the jury

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an alleged defective condition on the track at the switch, although there was no allegation in the complaint concerning defective track or switch, and that the jury might believe, from this instruction, that they had a right to find the defendants guilty because of such alleged defective condition on the track. However, at the request of appellants, the court gave instruction No. 3, which reads:

"There is no charge of any negligence or breach of duty in connection with the maintenance of any roadway or track conditions and you cannot base any verdict thereon against the defendants doing business as Chicago Surface Lines."

When the instructions are read as a connected series, we are of the opinion that the jury would understand that they could only find the defendants guilty on proof by a preponderance of the evidence of the specific negligence charged in plaintiff's complaint.

Appellants complain of the refusal of the court "to give their refused instructions Nos. 4 and 5." Instruction No. 4 informed the jury that there is no statute or ordinance regulating the precise speed at which a street car should be operated. Instruction No. 5 informed the jury that at the time of the accident there was in full force and effect a statute which prohibited any person from driving a motor vehicle upon any public highway at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, and that if the jury believed that the motor truck violated the statute, and that in so doing he was guilty of negligence which was the sole cause of the injuries to plaintiff's intestate, then you should return a verdict finding the defendants, Chicago Surface Lines, not guilty. We are of the opinion that the court was right in refusing to give instructions Nos. 4 and 5. Plaintiff's intestate was a passenger on the street car, and the instructions would tend to confuse the jury. Chicago Surface Lines refused



instruction No. 6 informed the jury that a street railway company is vested with the superior right of way over other vehicles over the portion of the street between the street intersections occupied by its tracks. Plaintiff concedes that the instruction correctly states the law governing the right of a street railway over other vehicles over the portion of the street between street intersections, but insists that the instruction is not applicable to the facts in the instant case. Plaintiff states that the duty of defendants to its passengers is not measured by the relative rights of the truck driver to defendant, but by the rights arising from the relationship existing between appellants as common carriers of passengers, and plaintiff's intestate. We are of the opinion that the court did not err in refusing to give the instruction. Appellants also complain about the giving of plaintiff's instruction No. 2, which informed the jury "that negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do". Appellants' view is that the definition is unsound and misleading in that it is not confined to what a reasonable man would do, or refrain from doing in the same or similar circumstances. We agree that it would be better to have the suggested language in the instruction. However, we are of the opinion that the jury would understand the instruction as meaning the doing or failure to do something which a prudent and reasonable man would or would not do "in the same or similar circumstances." Chicago Surface Lines refused instruction No. 7 reads:

"On July 23, 1937, there was in full force and effect in the State of Illinois the following statute: 'Sec. 54 - Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway.' If you believe from

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the evidence in this case that the driver of the truck on the occasion in question violated the foregoing statute, and that in so doing he was guilty of negligence which was the sole cause of the injuries to plaintiff's intestate, then you should return a verdict finding the defendants, Chicago Surface Lines, not guilty."

The first part of the instruction was given as appellants' instruction No. 3. Plaintiff argues that the phrase, "which was the sole cause of the injuries to plaintiff's intestate" would tend to confuse the jury, in that they would have to assume that if the truck driver had violated the statute, it was conclusive that his negligence was the sole cause of the injuries to plaintiff's intestate, and would have disregarded other facts in the case which tended to show that appellants had been guilty of negligence which contributed to the injuries of plaintiff's intestate. We find that the court did not err in refusing to give the instruction. An examination of all of the instructions that were given convinces us that the jury was properly and fully informed as to the law governing the case.

As a third point, appellants assail the judgment because of errors which they claim were committed in the admission of evidence. A policeman who arrived at the scene of the accident shortly after it happened, testifying for plaintiff, was asked what, if anything peculiar, he noticed about the switch. Plaintiff contends that there was a difference of opinion as to where the accident actually occurred, and that in any event appellants were not prejudiced because of the giving of the following instruction:

"There is no charge of any negligence or breach of duty in connection with the maintenance of any roadway or track conditions and you cannot base any verdict thereon against the defendants doing business as Chicago Surface Lines."

Plaintiff also states that appellants' given instruction No. 34, heretofore mentioned, which informed the jury that the burden was not upon appellants but that the burden was upon the plaintiff to show that the appellants were guilty of the specific negligence as

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charged in the complaint, cured the error, if any. A careful examination of the testimony as set out in the abstract, and of the instructions, convinces us that appellants were not harmed by the admission of the testimony.

Appellants also complain that a policeman who arrived at the scene of the accident after the occurrence and after the street car had been removed, was permitted to testify that the motorman told him that he applied the air and stepped back from the controls in order to avoid any injury from the crash. Appellants insist that the conversation was no part of the res gestae and was inadmissible as to them. Plaintiff granted that the statement of the motorman was not a part of the res gestae. Plaintiff states that at the time the evidence as to the conversation was introduced, the motorman was a party defendant, and that the evidence was admissible as an admission against interest. Counsel for the Chicago Surface Lines also represented the motorman. He made a general objection against the admissibility of the testimony. An examination of the abstract satisfies us that he did object in behalf of the Chicago Surface Lines on the ground that the conversation was not a part of the res gestae. At that time the conversation was undoubtedly admissible as to the motorman. In our opinion, the court should have cautioned the jury to consider the conversation only as to the motorman and to disregard it as to the Chicago Surface Lines. The record does not show that any such request was made. At the time the motorman was dismissed from the case, the jury should have been cautioned to disregard all testimony as to the conversation between the police officer and the motorman, following the accident. However, no such suggestion was made to the court. It is suggested that the motorman was made a party to enable the plaintiff to call him as a witness under Section 60 of the Civil Practice Act, and that the purpose having been accomplished, the motorman was dismissed on motion of

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the plaintiff. Without knowing more about the matter, we cannot assume that the attorney representing the plaintiff was actuated by improper or dishonest motives. As the testimony was admissible as to the motorman at the time it was introduced, and as there was no suggestion to the court that the jury be cautioned not to consider it as to the Chicago Surface Lines, or to strike it after the dismissal of the motorman, we would not be warranted in setting aside the judgment on that account. Appellants call attention to the fact that the motorman testified that when the truck made the turn to the left, he had no opportunity to sound the gong and did not sound it. An objection by counsel for the owner of the truck was sustained as to not having an opportunity to sound the gong, but the statement that he did not sound the gong was permitted to stand. Thereupon the witness was asked: "Did you have time to sound it at all?" He answered "No, sir." Another objection by the attorney for the truck owner was sustained. In the meantime, however, the witness had answered the question and the answer was not stricken. Appellants argue that whether or not the motorman had an opportunity to sound the gong when the truck made the turn to the left, was not a conclusion but was a statement of fact. While the witness was not permitted to answer whether he had "opportunity" to sound the gong, he did answer that he did not have "time" to sound the gong, which in our opinion, was the equivalent.

Finally, appellants contend that the damages allowed by the jury are excessive. Plaintiff's intestate was 19 years of age, and was in good health, with no deformities. She earned \$28.00 per week. She was survived by her father, who was 50 years of age, and by a brother who was 16 years of age who was living at the home of an aunt. The intestate also lived at the home of the aunt. There was also a half sister who was 8 years of age and who lived with her own father.

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There is evidence that the father received contributions from the deceased many times; that his occupation was that of a jeweler and that because of the depression he did not work steadily and that she supported him because he was "broke". The brother testified that his sister paid his board and room, bought his clothes and gave him spending money; that he lived with her and went to a junior high school, and that after her death he discontinued school and went to work. The half sister testified that the deceased bought some of her dresses and clothes because her father who worked in a bakery could not afford to buy them for her, and that she also received small sums of money every week and for school supplies. There is a presumption that substantial damage results to a parent by the reason of the death of a child. Appellants contend that this presumption does not warrant an award of 70% of the maximum amount permitted by the statute, in the absence of evidence reasonably justifying such an award. We are of the opinion that we would not be justified in disturbing the damages determined by the jury.

After the briefs were filed, appellants were granted leave to file an additional record. The additional record shows that on July 18, 1933, a receipt and partial satisfaction was filed in the office of the Clerk of the Circuit Court. The document is a receipt to defendant Frank W. Flammang, wherein plaintiff acknowledged the payment of \$2,578.63 in partial satisfaction of the judgment against Flammang. In the motion no suggestion is made as to why the additional record is important in the consideration of the case.

For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

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CARL FREUDENBERG and MARY FREUDENBERG,

Defendants,

v.

JAMES E. DOOLEY,

Plaintiff.

CHICAGO COURT

COOK COUNTY.

2031A-6-37

MR. JUSTICE BURKE DELIVERED THE VERDICT FOR THE COURT.

87th Street is a two lane highway, running east and west, and the Southwest Highway is a four lane highway, running northeast and southwest. The place where they intersect is in Cook County and is in the open country, with no obstruction to visibility. There are "stop signs" on both sides of 87th Street, for the purpose of warning operators of vehicles to stop before driving across the Southwest Highway. The Southwest Highway is a through highway. Between 2 and 3 o'clock on the morning of June 30, 1937, Carl Freudenberg was driving his Chevrolet Coupe automobile in an easterly direction along 87th Street. His wife, Mary Freudenberg, was seated alongside of him. It was a clear summer night. He stopped his car about 8 feet west of the Southwest Highway. He looked north and did not see any vehicles approaching. He looked south and saw two automobiles about 400 feet south of 87th Street. They were proceeding in a northeasterly direction on the easterly side of the Southwest Highway. He then proceeded to drive his car across the highway. An automobile driven by James E. Dooley, which was one of the automobiles traveling in a northeasterly direction, struck the right rear end of Freudenberg's car. Immediately before the impact, the Dooley car was being driven at a speed of between 40 and 50 miles an hour. As a result of the impact, Freudenberg's car was turned around twice and headed in a southeasterly direction. His wife was thrown out of the car and injured. The right door of the car was damaged and the right wheel broken.

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On August 8, 1937, plaintiffs filed their two count complaint against defendant in the Superior Court of Cook County. The first count, in behalf of Mary Freudenberg, charged defendant with wantonly or maliciously driving his automobile at an excessive rate of speed, having no regard for the safety of others, and also with various acts of negligence. This count asserted that she was in the exercise of due care and caution for her own safety, and asked damages because of the injuries she suffered. The second count, in behalf of Carl Freudenberg, was virtually a repetition of the first count, except that he asked to be compensated for the damages to his automobile, and also for damages which he claimed by virtue of his relationship as a husband. Issue was joined and the case was tried before the court and a jury. At the request of plaintiffs, the court submitted to the jury a special interrogatory, which reads: "Was the conduct of the defendant in the operation of the automobile in question of such a character as to show a wanton and wilful disregard of the safety of persons who might be on the highway in question, as charged?" The jury answered, "No". The jury returned a verdict of "not guilty". The court denied plaintiffs' motion for a new trial and entered judgment on the verdict, to reverse which this appeal is prosecuted.

Plaintiffs' theory of the case is that under the evidence, they were entitled to recover because of the negligence or the wilful and wanton conduct of defendant. A perusal of the transcript of the testimony convinces us that the case presented a question of fact for the determination of the jury, providing there were no errors in the giving of instructions. Plaintiffs criticize the action of the court in giving, at defendant's request, four instructions which informed the jury that plaintiffs could not recover unless they proved that they were in the exercise of due care. Plaintiffs point out that the four instructions should have been qualified to

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the extent of informing the jury that contributory negligence was no defense to a wilful and wanton act, or to the effect that plaintiffs could recover for a wilful and wanton act, even though the jury believed they were guilty of contributory negligence. There is no contention that the jury was not properly instructed as to the negligence charges. Plaintiffs also contend that the repetition of instructions on the proposition of due care served to emphasize the error of requiring plaintiffs to prove the exercise of ordinary care where the evidence authorized a recovery for wilful and wanton misconduct. Plaintiffs also urge that in an instruction directing a verdict, the omission of a fact or element essential to the cause of action, cannot be supplemented or supplied by other instructions in the series. In Hardridge v. Butler, 168 Ill. 504, 512, the court said:

"The law applicable to different questions may be stated in separate instructions, and the entire law applicable to all the questions involved in a case need not be stated in each. In such case the instructions supplement each other, and if they present the law fairly when viewed as a series, it will be sufficient. But if an instruction directs a verdict for either party, or amounts to such a direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed."

To the same effect are Montgomery Coal Co. v. Barringer, 218 Ill. 327, 338; Lake Erie & Western R. R. Co. v. Wilson, 169 Ill. 89; I. C. R. Co. v. Smith, 208 Ill. 608; Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243; Mooney v. City of Chicago, 239 Ill. 414.

Plaintiffs also argue that instructions directing a verdict for the defendant, which exclude any theory on which the plaintiffs may recover, are erroneous, and that contributory negligence of plaintiffs is no defense to a wilful and wanton act.

Defendant does not challenge the propositions of law stated by plaintiffs. He insists, however, that plaintiffs are not in a position to complain of the four instructions requested by defendant since no less than six of plaintiffs' given instructions are open

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to the same criticism. We have examined the record and find that the court, at the request of plaintiffs, did give the jury six instructions on the proposition of due care, and that such instructions likewise ignored the charge of wilful and wanton misconduct. It is well established that a party cannot complain of an error in instructions where the same error is found in the instructions which he offered. (Kelly v. Chicago City Railway Co., 183 Ill. 640; Arrensen v. Cartersville Coal Co., 241 Ill. 617; Wannon v. Kiel, 253 Ill. App. 550; Hill v. Murphy Beer and Co., 200 Ill. App. 328; Gourley v. Chicago & Eastern Illinois Ry. Co., 295 Ill. App. 160.) Plaintiffs reply to the contention that they committed the same error by asserting that they (plaintiffs) could proceed upon either the theory of negligence or the theory of wilful and wanton misconduct, or on both, and that they had the right to have the jury instructed on either or both of the theories, whereas the defendant's instructions were predicated on the theory of what plaintiffs could not recover on. Plaintiffs' given instruction No. 1 reads:

"You are instructed that even if you believe from the evidence that the driver of the automobile in which the plaintiff, Mary Freudenberg, was riding, failed to use reasonable care at and before the occurrence in question, still if you believe the plaintiff, Mary Freudenberg, herself was in the exercise of reasonable care for her own safety, then such failure, if any, on the part of the driver of the automobile in which she was riding cannot be charged against her and is not a defense to her suit; the court does not mean to be understood and is not expressing any opinion as to whether or not the driver of the automobile in question was in the exercise of reasonable care nor as to any other question of fact in the case."

The other instructions given by plaintiffs which mention the proposition of due care, are similar to the instruction quoted. It is obvious to us that the instructions on the proposition of due care which were given at the instance of plaintiffs, are open to the same criticism that is leveled at the instructions submitted at the request of defendant. If the instructions complained of were understood by the jury to mean that the plaintiffs were required to prove

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that they were in the exercise of due care, even though defendant was guilty of wilful and wanton misconduct, certainly the instructions on the same subject, given at the request of plaintiffs, would likewise mislead the jury. Admittedly, the instruction above quoted does not tell the jury that the failure of plaintiffs to exercise ordinary care would not be a defense to a charge of wilful and wanton misconduct. We agree with the contention of defendant that the six instructions given at the instance of plaintiffs, on the subject of ordinary care, are subject to the same criticism as the four instructions complained of, which were submitted by defendant. For that reason, plaintiffs cannot now complain.

Defendant maintains that there is not now before the court any question as to wilful and wanton misconduct because the jury decided that question in defendant's favor in answering the special interrogatory, and no motion was made in the trial court to set aside the answer to the interrogatory, nor in this court to set aside such answer because of want of support in the evidence. The argument proceeds on the theory that the jury having decided that defendant was not guilty of wilful and wanton misconduct, they could not be confused by the instructions on the subject of due care. Having decided that plaintiffs are not now in a position to complain about the objectionable instructions, it is unnecessary to discuss the proposition as to whether the fact that the interrogatory was answered in the negative, cured any error in the instructions given by the defendant. We observe, however, that two instructions were given on the question of wilful and wanton misconduct, one at the request of plaintiffs and the other at the request of defendant. Neither of these instructions told the jury that the question of wilful and wanton misconduct on the part of defendant depended in any way upon the care exercised by plaintiffs. We are of the opinion that the court was right in declining to grant a new trial.

For the reasons stated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

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EVA A. BLANT,

Plaintiff - Respondent,

v.

INGE ELSEN,

Defendant - Applicant.

IN SENATE, FEBRUARY 15, 1939.

This is an appeal by the defendant taken from an order entered by the court on February 15, 1939, denying the motion of the defendant to vacate an order dated November 25, 1938, dismissing her counterclaim on contract and releasing an attachment on the real estate. The defendant filed her counterclaim and contends that this counterclaim may be considered as being an answer to the litigation pending. A writ of attachment was entered upon the counterclaim without any hearing before a judge or master, as required by Rule 43 of the Rules of the Superior Court of Cook County. The demand as contended for by this defendant is for liquidated damages rather than for unliquidated damages. The order of November 25, 1938, was made pursuant to a motion of the plaintiff to dismiss the counterclaim and release the attachment, for grounds which the defendant claims were inadequate and are not sufficient to support the order of said date.

In this motion the defendant filed two petitions, one on February 10, 1939, and another on February 15, 1939, in support of her motion to vacate the order of November 25, 1938. On February 15, 1939, the date of the order appealed from, the defendant tendered an answer containing a counterclaim and affidavit for attachment, the filing of which answer was denied by the court. It appears from the statement of facts that the plaintiff filed an action in the Superior Court of Cook County against the defendant

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for slander and for equitable relief against a contract to pay the defendant for special assessment payments she had made for the plaintiff. The defendant not believing that the complaint stated a cause of action, filed a counterclaim for the money she had been promised for the payment of said special assessments. She also filed an affidavit for an attachment of the real estate on which she had paid the special assessments as the property of the plaintiff. Believing that her claim was liquidated, the hearing was not had before any judge or master prior to the issuance of the writ. The writ was issued and levied on plaintiff's real estate. The plaintiff filed a motion to dismiss the counterclaim and release of the attachment. This motion was sustained by the court on ex parte hearing on November 25, 1938, at which neither the defendant nor her attorney was present, due to illness of the defendant's attorney. On December 7, 1938, a motion was presented to the court and filed by defendant's attorney asking that the order of November 25, 1938, be vacated and that the motion of the plaintiff to dismiss the counterclaim be set for argument.

The defendant filed a further petition in support of the motion to vacate, which second petition was filed on February 15, 1939, and on that date the defendant's motion to vacate the order of November 25, 1938, was denied. At this time the defendant tendered an answer which included a counterclaim and affidavit for attachment, in order to avoid objections made by the plaintiff in her motion to dismiss the counterclaim for the reason that it was not filed in accordance with Sec. 38 of the Ill. Civil Practice Act, and the court refused leave to file such answer.

The first question that has been called to our attention is the plaintiff's motion to dismiss the appeal, which has been reserved to the hearing on the ground that the orders appealed from are not

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final or appealable orders or judgments, and our attention has been called by the plaintiff to the order entered by the court on November 25, 1938, which is in part as follows: "The counterclaim of the defendant be and the same is hereby stricken and dismissed", and the ground upon which this action was made, that is, that the order was not a final or appealable order, citing the case of Board of Education v. Board of Education, 301 Ill. App. 38, where the court dismissed an appeal in a case which is similar to the instant case. In this case the trial court sustained a motion to dismiss the plaintiff's complaint and it was entered on appeal. The court said:

"An order merely sustaining a demurrer to the complaint, and upon which no judgment is entered, is not a final adjudication. Freeman on Judgments (8th ed.) Vol. 2, p. 1512, par. 717. This rule is observed in the case of Irabbin v. Theoreas, 316 Ill. 30; Barber v. Wood, 318 Ill. 415. In each of the above cases it is stated that under such circumstances, the court will of its own motion dismiss the appeal. It is further stated by Freeman in the paragraph above referred to, that a judgment for costs only, without a determination of the cause, is not a final judgment. This principle is announced in Williams v. Huey, 283 Ill. 275. Where a motion to dismiss a complaint, which is in the nature of a demurrer, is sustained, for such ruling to become final, a judgment should be entered for the defendant to the effect that the plaintiff take nothing by virtue of such action and that the defendant go hence without day, or words of similar import and meaning. Chicago Portrait Co. v. Chicago Grayon Co., 217 Ill. 200. This same principle is announced in the cases of County of Franklin v. Blake, 257 Ill. 354; Williams v. Huey, supra, and France v. City of Marion, 297 Ill. App. 357."

and it does not appear from the order entered in the instant case that there is anything to the effect that the counterclaimant takes nothing by virtue of such action, or words of similar import and meaning. Therefore the plaintiff contends that in view of the rule of law and the reasoning of the court in the Board of Education case, the order of November 25, 1938, was not appealable and the plaintiff points to the record wherein it appears that subsequently on December 5, 1938 a motion was made to vacate the order of November 25,

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1938, which motion was denied in the order of February 15, 1939, which is the order sought to be annulled from, and the plaintiff contends that if the original order in which the counterclaim was stricken and dismissed was not appealable, the subsequent order refusing to vacate the original order could not be appealed; and further that on February 15, 1939, defendant's motion to file an answer including a counterclaim with an exhibit was denied, which is part of the same order sought to be annulled from, and the plaintiff contends further that this was not an appealable order.

Plaintiff suggests the further authority, in which a similar situation arose in the case of Nelson v. Louisa State Bank, 224 Ill. 83. In the Nelson case as in the instant case, the court refused leave to file a cross-bill. In the Nelson case the court set aside its order allowing the filing of a cross-bill, while in the instant case it refused to set aside its order striking and dismissing the counterclaim. And in the Nelson case the order striking the cross-bill from the files was also appealed from, while in the instant case it was not. However, the Supreme Court held that none of these orders was appealable and the appeal was dismissed. The court said upon this question:

"The errors assigned by appellant that are pertinent to this appeal are: (1) The court erred in setting aside its order allowing appellant to file his amended and supplemental cross-bill; (2) it erred in refusing him leave to file such cross-bill; and (3) it erred in striking from the files such cross-bill.

The principal contention of appellant in support of his assignment of errors is, that the statute authorizing the Auditor to appoint a receiver for the purposes aforesaid is unconstitutional. So far as this record shows, no order whatever has been entered in this case except the orders concerning the answer and cross-bill of appellant which have already been recited. No decree or order whatever has been entered by the court on the original bill and answer. An order dismissing a cross-bill in a suit in chancery is interlocutory. There is no interlocutory order entered by the court appointing a receiver or confirming the appointment of one by the Auditor. There is therefore no order

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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1. *Phragmites* (common)

1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

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or decree in the case that is reviewable by either the Appellate Court or this court. This court has frequently held that neither a writ of error nor an appeal will lie from a decree dismissing a cross-bill until the whole case is disposed of. Wheeler v. Russell, 12 Ill. 31; Monahan v. Quinn, 140 Id. 109; Village of Marletta v. Suburban Railroad Co., 209 Id. 301."

It appears from this record that a request to leave granted in the order of February 15, 1939, part of which is sought to be appealed from, the defendant filed her answer and thus issues were formed on plaintiff's complaint and the defendant's answer, which were and still are pending and undetermined in the Superior Court of Cook County. It appears that the issues which are sought to be raised in the counterclaim may well be settled in the course as it is left pending, as the same issues are raised in the plaintiff's complaint, and for that reason this appeal should be dismissed. See Van Gousen v. Thorne, 90 Ill. App. 445; Brange v. City of Marion, 297 Ill. App. 353, which are in the main applicable to the contention made by the plaintiff.

It is also contended by the plaintiff that the counter-claim was properly dismissed because it was not filed as a part of the answer as required by the Civil Practice Act. It appears from the record that on July 25, 1938, the defendant filed her counterclaim, and that the plaintiff then filed her motion to dismiss the counterclaim among others for the reason that "(1) Counterclaim is improperly filed pursuant to Section 38 of the Civil Practice Act"; Section 38 of the Civil Practice Act, paragraph 2 provides as follows: "The counterclaim shall be a part of the answer and shall be designated as counterclaim."

Upon a like question, which was before this court, the Supreme Court in Bailey v. Valley Nat. Bank, 127 Ill. 332, said:

The Commission  
 has the honor to  
 acknowledge the  
 receipt of your  
 letter of the 14th  
 inst. and in reply  
 to inform you that  
 the same has been  
 forwarded to the  
 proper authorities  
 for their consideration.  
 Very respectfully,  
 Your obedient servant,  
 J. M. Smith

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" \* \* \* under the 29th section of the Practice Act, in actions ex contractu, the defendant having claims against the plaintiff, 'may plead the same, or give notice thereof under the general issue, or under the plea of payment;' and this is the statute under which a notice of set-off, alone, could be made available. There was here no plea filed under which such a notice could be given, and, standing alone, it was properly stricken from the files."

This court in Rodesch v. Atey, 71 Ill. App. 482, upon a like question said:

"The right to give notice of set-off under the general issue means under the general issue properly pleaded. The general issue having been improperly pleaded and stricken from the files, the case should be treated as if the notice had been filed without any plea, and the statute gives no right to file notice of set-off unaccompanied by any plea. Having been filed without right it was properly stricken from the files."

See also Roth v. Roth, 284 Ill. App. 71.

A further reason that the court was justified in entering an order that the attachment writ be released is that the defendant failed to comply with rule 43 of the Superior Court, which provides as follows:

"In any case of attachment in aid, where in an action on contract the plaintiff's demand is for unliquidated damages, it shall be necessary, before any writ of attachment issues, that the plaintiff, his agent or attorney, apply to Judge or Master in Chancery of this Court and be examined under oath by such Judge or Master concerning the cause of action; and thereupon such Judge or Master shall endorse upon the affidavit the amount of damages for which the writ shall issue."

This rule was not complied with by this defendant. The rule which is controlling is stated in Leppan & Hazle v. The Inter-State Produce Co., 305 Ill. App. 370, (Abst.) in which the court said:

"Damages are said to be liquidated where they can be determined from the contract itself, or from the contract and the rules of law applicable thereto. Where it is necessary to introduce evidence before plaintiff can prove his case, the damages are said to be unliquidated. Applying this test to the affidavit in question, we think it is manifest that plaintiff would be unable to prove his case without the introduction of evidence."

And when we come to examine the claim alleged to be based upon a contract, we find from this contract that the plaintiff is alleged to have agreed to pay the sum of money equal to the



interest, delinquent penalties, costs of estimates and 50% of the principal of the said special assessment upon its face, and it is the contract for the recovery of the special assessments alleged to have been paid that is controlling, and it seems that it would be necessary to establish the damages sought to be recovered. From the authorities, the claim is unliquidated and it is necessary to determine the amount of damages from intrinsic evidence.

From an examination of the other questions, we think the court did not err in entering the order, and further that the order was not an appealable one. Therefore, under the authorities we have cited, the appeal is dismissed.

ATTEST: Clerk of Court.

DENIS E. SOUL IVAN, P.J. AND JAMES J. O'NEAL, J. C. CLERK.



40845

THE PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. J. D. MIKEL,

Plaintiff - Appellee,

v.

ILLINOIS RACING COMMISSION and LEO  
SPITZ, ARTHUR SCHLACK, and WALTER  
C. PLACOCK, as members of the Illinois  
Racing Commission, and GEORGE W.  
FOSTER, as Secretary thereof,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3031A 654

MR. JUSTICE HENRY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants as members of the Illinois Racing Commission from a judgment entered by the Circuit Court of Cook County April 7, 1939, wherein the court directed that a peremptory writ of mandamus issue against the defendants as members of the Illinois Racing Commission, commanding them forthwith and without delay to grant and issue to the plaintiff, J. D. Mikel, a license as a trainer conformable to his application dated January 19, 1939, as provided by an Act of the General Assembly of the State of Illinois known as the Horse Racing Act, in force June 13, 1937, and all amendments thereto and amendatory thereof.

The original petition for mandamus was filed, according to the record, on April 29, 1938, to which the defendants filed their joint and several answers. Upon the taking of proof on the issues joined, the plaintiff thereafter filed an amended and supplemental petition, seeking the issuance of a trainer's license for the year 1939 instead of 1938 as sought in the original petition to which the defendants filed an amended joint and several answer. The plaintiff replied, and upon the new issues joined, a trial was had before the court upon the facts and the law, and after a hearing, judgment was entered by the court granting the writ as prayed for by the plaintiff.

The facts as they appear in the record are that the plaintiff made application for a horse trainer's license for the year 1938

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and again in January, 1939, and applied for a similar license for the year 1939, to expire December 31, 1939, that he tendered the statutory license fee of \$5.00, but was refused the license by the defendants. It appears from the stipulation of facts, being a transcript of the proceedings had before the Illinois Racing Commission upon the petition of the plaintiff to review the order theretofore entered by the Illinois Racing Commission ruling the plaintiff off the tracks of Illinois for life because he had entered and raced in a certain race on August 15, 1935, a horse known as "My Bane" as a 3-year-old in violation of the rules covering corrupt practices. In this proceeding the plaintiff was represented by the race counsel who here represents him, and after extended hearings the Commission, composed of the same members who are defendants in this cause, on October 25, 1935, entered the following order:

"The Illinois Racing Commission after a thorough and exhaustive hearing finds:

1. That 'My Bane' was a colt born in the year 1932 out of the dam 'Birdie L';
2. That 'Birdie L' was crippled in 1933 and without foal at side;
3. That the colt 'My Bane' was broken as a yearling in 1933;
4. That the colt 'My Bane' was gelded in the year 1933 and that no notice thereof was given to The Jockey Club.
5. That the horse 'My Bane' was a racing 3-year-old August 15, 1935;
6. That the Registration Certificate of The Jockey Club of the horse 'My Bane' was issued upon false representation of the date of birth contained in the application for registration made by J. D. Mikel on the 9th day of October in 1933.

It is therefore ordered that the order of August 15, 1935, entered by the Stewards at Lincoln Fields Race Course be and the same is hereby approved; that the license issued by the Illinois Racing Commission to J. D. Mikel is hereby revoked and that the Racing Association under the jurisdiction of the Illinois Racing Commission are hereby ordered to deny to J. D. Mikel all privileges of their respective race courses."

and it was upon these proceedings and this order that the defendants relied when they refused to issue the license desired by the plaintiff.

The plaintiff, over the objection of the defendants, presented



testimony seeking to establish the fact that "My Bane", the horse owned by the plaintiff, was a 2-year-old and not a 3-year-old when he raced at Lincoln Fields on August 15, 1935, Dr. Merrilat, the principal witness for the plaintiff, stated that the horse was a 2-year-old; that he pronounced him 30 months old after his examination at the request of Dr. McIntosh, a veterinarian for the plaintiff, but Dr. McKillip, a veterinarian, who testified for the defendants, stated that when he examined the horse on August 15, 1935, he was 35 months old instead of 30 months old and, therefore, a 3-year-old and not a 2-year-old.

It further appears from the record that on November 4, 1935, the plaintiff Mikel filed a petition for a writ of certiorari to the Superior Court of Cook County, No. 35S-15631, seeking to review the final order entered by the Commission on October 25, 1935, ruling the plaintiff off the tracks for life; that after a hearing the Superior Court entered an order on February 7, 1936, quashing the writ of certiorari and dismissing the petition of Mikel, and upon appeal the Appellate Court, First District of Illinois, 332 Ill. App. 633, affirmed the order of the Superior Court, thereby refusing to quash the record made by the Commission wherein the plaintiff was ruled off the track for life; that the final judgment in this cause is res judicata to the issues of fact raised by the plaintiff in his replication wherein he denies the right of the defendants to refuse to issue him a license on account of the order entered October 25, 1935; that on October 25, 1935, the plaintiff filed a bill in equity in the Superior Court of Cook County, No. 35S-12252, against these defendants to enjoin the defendants from interfering or preventing him from entering or running any of the horses of the plaintiff, including "My Bane" referred to in the order entered October 25, 1935; that in said equity proceedings it was contended that the same issues



were involved as are involved in this proceeding, that is as to the fact that "My Hane" was a 3-year-old and not a 2-year old on August 15, 1935, when he was raced by the plaintiff as a 2-year-old; that thereafter the Superior Court sustained the motion of the defendants to dismiss the amended and supplemental complaint filed by the plaintiff in said equity proceedings; that the motion to dismiss as sustained by the Superior Court, pleaded the action of the Superior Court case No. 358-15831, involving the certiorari proceedings and the subsequent action of the Appellate Court, First District of Illinois, 292 Ill. App. 633, as res judicata and estoppel by the verdict. It is upon the facts as they appear in the record that the defendants seek a reversal of the judgment entered by the trial court granting the writ of mandamus.

It appears from the record that the plaintiff here seeks to compel the performance of a claimed right.

The duties of the defendants in the instant case as members of the Illinois Racing Commission are provided for by Ch. 8, Sec. 37a, which act was passed June 13, 1937, and is entitled "Horse Racing". Among the provisions of the statute it is provided:

"The Commission shall have the right to grant, refuse, suspend or withdraw licenses to horse owners, trainers, jockeys, agents, apprentices, grooms, stable foremen, exercise boys, veterinarians, valets and platers to engage in their vocation within racetrack enclosures of licensed racetrack associations. Such license, when issued, shall be for the period ending December 31st in each year for a nominal fee of not more than \$5.00 \* \* \*. The Commission shall have the right to enact such rules, regulations and conditions necessary or proper for the enforcement and supervision of the duties and requirements in this paragraph contained."

This act was enacted in 1937 as an amendment to the original Horse Racing Act. Prior to that time there was no specific provision granting to the Illinois Racing Commission the power either to grant, refuse, suspend or withdraw licenses to horse owners, trainers, jockeys, etc., and the defendants contend that unless this statute



imposes a duty upon the defendants, acting as the Illinois Racing Commission, to grant trainer's license to the plaintiff the prayer of the plaintiff for a writ to compel the granting of such license must be defeated, and suggest that an examination of this act to determine whether such a duty is imposed is pertinent.

Upon an examination of the order directing the defendants to issue a trainer's license as applied for by the petitioner, we find that the order directs the defendants, without delay to grant and issue to the plaintiff and relator, J. D. Nibel, a license as a trainer, conformable to his application dated January 19, 1939, heretofore tendered and presented by him to said defendants, for the period ending December 31, 1939. The Supreme Court in the case of The People v. Village of Oak Park, 356 Ill. 154, held, where by the passing of time or the happening of some other cause the circumstances have so changed that the writ of mandamus will be of no practical benefit to the petitioner the court will refuse the writ, and where the petitioner asks for a writ commanding the holding of an election on a certain date, which date has passed by the time the case is presented to the Supreme Court for decision on appeal, so that no real benefit will accrue to the petitioner from the issuance of the writ, there is no reason for deciding the case on the merits, and the appeal will be dismissed even though the trial court awarded the writ. So we find that the period of time for this license had passed by the time the matter was presented to this court for a decision on appeal, and applying the rule of the Supreme Court that as no real benefit will accrue to the petitioner from the issuance of the writ, there would be no reason for passing upon the merits of the controversy as presented here, the appeal will be dismissed even though the trial court awarded the writ. For the reasons stated the appeal is dismissed.

APPEAL DISMISSED.

DENIS E. SULLIVAN, P.J. CONCURS,  
BURKE, J. DISSENTS.

Approved: \_\_\_\_\_

Special Agent in Charge

U. S. DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

March 1, 1964

To: \_\_\_\_\_

From: \_\_\_\_\_

Re: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Very truly yours,

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W. L. \_\_\_\_\_

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DEAN E. WILSON  
DIRECTOR, FBI



40856

CHARLES L. MCARTLIN, as Successor (Trustee, )  
(Plaintiff) Appellee, )

v. )

DORA CARLSON, et al.,  
(Defendants). )

CHARLES L. MCARTLIN,  
(Petitioner) Appellee, )

v. )

ANNA BOGOLICK, et al.,  
(Respondents). )

On Appeal of ANNA BOGOLICK,  
(Respondent) Appellant. )

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff, Charles L. McArtlin, is the successor in trust under the terms of a trust deed signed by Carl A. Carlson and Dora Carlson, dated January 28, 1923, and recorded in the Recorder's Office of Cook County on February 5, 1923, as Document No. 10277115. The plaintiff as such successor trustee filed a complaint in the Circuit Court of Cook County to foreclose said trust deed, alleging his appointment as successor trustee, the default in payment of certain bonds and interest coupons and praying for a foreclosure of said trust deed and a decree of sale under the terms of said trust deed, for the benefit of all bondholders. A decree of sale was entered in said foreclosure proceedings finding that there was due the plaintiff for his attorney's fees the sum of \$2,450, for his fees as successor trustee, \$225, and to the bondholders the sum of \$57,480.44.

The State Mutual Life Assurance Company was made a party defendant, was duly served with summons and was defaulted. The

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decree contained a finding that said State Mutual Life Insurance Company was made a party defendant for the reason that it had paid certain taxes on the property herein involved, but that the said State Mutual Life Insurance Company never had and never claimed to have any interest in the said property; and that any taxes it may have paid, it paid only as a volunteer and that it was not entitled in this action or in any other action it might institute, to the return of all or any part of the money used to pay said taxes. The decree further found in paragraph 24 thereof that under the terms of the trust deed involved herein, the trustee has full power and authority to bid at any sale which may occur herein and to pay for said bid in bonds secured by the trust deed involved herein, or by applying the credit found to be due him in the decree, against such bid; that in the event said trustee, the plaintiff herein, should bid in the premises involved herein at the sale, such trustee shall have full power and authority without further order of the court, to pledge the Certificate of Sale issued to him pursuant to such sale, or the title to the premises involved herein after the period of redemption has expired, as security for any loan to him for the purpose of paying present or past due taxes on the premises involved herein, the costs of the foreclosure, including attorney's fees, trustee's fees, master's fees, commission on such loan, title charges, court costs, etc.

The decree ordered that unless the amounts of money found due by the decree were paid within three days, the property involved be sold and that at the foreclosure sale the plaintiff, as successor trustee, might bid at the sale with powers as found in the preceding paragraph. The decree made reservation of jurisdiction for the purpose of advising and instructing the plaintiff in respect to his powers and duties as trustee under the said trust deed, and to



supervise and direct the said plaintiff in further administering the said estate and to pass on all questions concerning the sale or the mortgaging of the premises involved herein. An order was entered August 16, 1937, amending the decree of foreclosure by making findings setting forth Article 16 of the trust deed sought to be foreclosed upon. A sale was held on August 16, 1937, pursuant to the foreclosure and the plaintiff, as successor trustee, purchased the premises involved herein for \$55,000. The master's report of sale found that the bid of the plaintiff was made pursuant to the provisions of the trust deed foreclosed in this cause, which gives the said successor trustee the right to apply the credit found to be due him in said decree against his bid. On July 8, 1938, almost a year after the entry of the decree, the State Mutual Life Assurance Company filed its petition to vacate the decree. This petition sets up that the petitioner being the owner of certain property described in said petition, made payment of the taxes for the years 1938 to 1933, both inclusive, in order to maintain its lien upon said property; that the tax bills obtained by the petitioner in order to pay said taxes, in addition to the property on which petitioner had a first mortgage, included real estate owned by the defendant, Dora Carlson; that the petitioner had made payment inadvertently of taxes in the sum of \$5,444.90 on the premises involved in the foreclosure proceedings and that thereby the petitioner had acquired a lien to the extent of the amount of such payment which is prior and paramount to the lien of the trust deed sought to be foreclosed herein; that the petitioner was named as a party defendant in this cause and was duly served with summons; that the attorneys for the petitioner had no notice of the fact that the petitioner had made such payment of taxes and that prior to the return day of said summons the petitioner's attorneys inquired



of the attorney for the plaintiff herein the reason for its being made a party to this proceeding and that the attorney for the plaintiff represented that the petitioner was made a party to the proceedings because the petitioner was made the owner of a deficiency decree; that the petitioner was deceived thereby and did not file an answer and allowed a default to be entered against it; and praying that the order of default and decree of sale entered herein be vacated and set aside and that there be a resale of the premises made and that out of such resale the petitioner's lien for such taxes paid by it be first paid before payment of any other lien.

Plaintiff filed an answer to this petition, denying that by the alleged payment of taxes that the petitioner acquired any kind of a lien whatsoever; specific denial was made that plaintiff's attorney represented to the petitioner's attorney that the petitioner was made a party to this proceeding because the petitioner was owner of a deficiency decree and statement was made that the attorney for plaintiff did not at any time make any such representation; that the petitioner's attorney twice telephoned the plaintiff's attorney and on each occasion merely asked the plaintiff's attorney for a letter in which plaintiff agreed to take no money judgment against the petitioner; that the plaintiff's attorney gave such a letter to the petitioner's attorney; that the petitioner is a mere volunteer and is entitled to no lien upon the premises involved herein; that the plaintiff as trustee in the trust deed involved in this foreclosure checked the condition of the general taxes from time to time after the default on February 1, 1934; and that since such investigation showed that the taxes on the premises involved herein were being paid, the plaintiff refrained from foreclosing the lien of said trust deed for some three years, since apparently the net income from said premises was being applied by the then owner to the payment of general taxes. This answer was verified by the plaintiff in this action.





On January 30, 1939, the plaintiff filed a petition in this cause setting up that the plaintiff is now the holder of the master's deed covering the property involved herein; that the decree entered herein provided that the Court retained jurisdiction of the parties to the suit and the subject matter thereof for the purpose of advising and instructing the plaintiff in respect to his powers and duties as Trustee under said trust deed, and to supervise and direct said plaintiff in further administering said estate; and for the purpose of passing on all questions in connection with the sale or mortgaging of the premises involved herein; that as disclosed by the petition of the State Mutual Life Assurance Company filed herein, said company appears to have paid by mistake general taxes on the property involved herein to the extent of \$5,986.87; that the petitioner had arranged for a settlement of said claim by paying said company one-half of the amount paid by said company on account of said taxes; that in addition to said sum the trust will have to pay costs and fees incurred in the foreclosure proceeding and taxes and other expenses, all of which charges are valid charges against the trust estate; that to pay said charges the petitioner has arranged to obtain a loan in the amount of \$10,500; that the petitioner believes it would be to the best interests of the trust to make such loan and to disburse the proceeds to pay said State Mutual Life Assurance Company, said foreclosure fees, trustees fees, taxes, etc.; and in order to ascertain the wishes of the beneficiaries under the trust (the holders of outstanding and unpaid bonds secured by the trust deed foreclosed herein) that the petitioner had caused a letter, copy of which is attached to said petition, to be sent to all of said beneficiaries at or about the date said letter bears; that the owners and holders of the bonds secured by said trust deed are numerous in number and widely scattered; that some of such

OF JUNE 1914

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AMERICAN MEDICAL ASSOCIATION

CHICAGO, ILL., U.S.A.

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owners and holders are unknown, and in other cases the addresses of owners and holders of said bonds and interest coupons are unknown; that the interest of all such owners and holders of said bonds are identical with the interests of the bondholders made parties to the petition; that Charles W. Albers, as Receiver of the Lake View State Bank, Walter Biehl and Anna Bodliker are the holders of bonds secured by the trust deed herein foreclosed and they are made parties to said petition, individually and as a class representing all the unpaid holders of bonds and interest coupons secured by the trust deed involved herein. The prayer for relief requested that the court find that the petitioner has full power to negotiate and consummate the settlement with the State Mutual Life Assurance Company; to approve and authorize said settlement, and to find that the petitioner as trustee has full power to mortgage the trust property and to authorize the mortgaging of said property.

Attached to said petition is a letter dated January 19, 1939, addressed to the "Holders of Bonds signed by Carl A. Carlson secured by Property at 3257-59 Broadway, Chicago", which sets forth the filing of the foreclosure, the purchase of the property at the sale, the expiration of the period of redemption and that the plaintiff holds title to the property, subject to various unpaid items, etc., for the benefit of the bondholders; that the State Life Assurance Company during 1934 paid by mistake \$5,966.87 on taxes on the trust property; that when the insurance company discovered their mistake last year they started suit for the return of their money by filing a petition in the foreclosure proceeding; that after the elapse of much time and after negotiations that plaintiff's attorney arrived at a tentative settlement with the insurance company involving payment to it of one-half its claim, or approximately \$3,013.65



in return for a full release from the insurance company, and the settlement not to become final until the bondholders accept by acquiescence; that the plaintiff proposes to place a mortgage on the trust property, due in five years, drawing interest at the rate of 5% per annum, in the sum of 10,500, to pay off taxes, the said insurance company, court costs, attorney's fees, trustee's fees, commission, etc.; that if the holders of one-third or more in principal amount of the outstanding and unpaid bonds file written objections to the consummating of the fore-said settlement with the State Mutual Life Assurance Co. or the making of the mortgage which objections are to be filed with the plaintiff within fifteen days, then the plaintiff will not make the settlement or the mortgage.

Anna Roddiker was named as a defendant in said petition in a representative capacity and was duly served with summons. She prepared and filed her answer and counter-claim, individually and as one of the class representing all of the unpaid holders of bonds and interest coupons secured by the trust deed involved herein. Said answer set up paragraph 24 of the foreclosure decree; that said paragraph of said decree is supposed to be based upon the terms of the trust deed contained in article 16 of the said trust deed; that said Article 16 does not provide as is found in paragraph 24 of the decree and that there is no provision in the trust deed giving the said plaintiff any such power as is found to be printed in said paragraph 24; that said paragraph 24 in so far as it finds that the plaintiff is entitled to mortgage the premises involved herein is not based upon the terms of the trust deed and is void and of no effect. It is further denied that a settlement as outlined in said petition is for the best interests of the within estate and that leave to consummate same should be denied. Also, denial is made that the petitioner is entitled to the relief prayed.

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A counter-claim was filed by said Anna Roddiker which adopts paragraph 10 of the petition and files the counter-claim for and on behalf of all of the unpaid holders of bonds and interest coupons, secured by the trust deed involved herein; that such proceedings have been taken herein as shown by the complaint, the various answers, the decree, the order amending the decree of foreclosure entered herein and all of same are made a part of the counter-claim as if incorporated therein in full; that on July 12, 1937, a decree was entered herein and paragraph 24 of said decree is set out in full in said counter-claim; that the only powers granted to the plaintiff are contained in Article 18 of the trust deed and that said Article 18 does not grant any power to the plaintiff to make a mortgage on said premises; that the bondholders have never had any notice of the fact that paragraph 24 of said decree contained provisions conferring additional powers and rights upon the trustee, other than those set forth in said trust deed; that said plaintiff fraudulently caused said decree to be entered herein, containing said additional powers not granted to him under the terms of said trust deed; and that plaintiff has never given any notice to any of the bondholders until the filing of the petition herein, of the entry of the decree herein containing such additional powers not contained in said trust deed. That under the terms of said trust deed there is no power granted to said trustee to pledge the title to said premises as security for any loan. That the trustee has not the authority to make any loan upon said premises or to pledge the title to said premises and that the bondholders have never at any time authorized said trustee or granted to him any additional powers other than those contained in said trust deed. The power for relief requested the court to determine that the counter-claim was filed as a representative suit on behalf of all bondholders; that the counter-claim be treated as a writ of error coram nobis or a bill of review

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herein and that the court review and revise said decree, modifying same by striking from said decree the provisions in said paragraph 24 of said decree which are not contained in said trust deed foreclosed upon herein and for general relief.

The plaintiff filed a written motion to strike the counter-claim of Anna Boddiker on the ground that a decree of foreclosure had been entered in this cause and that it is too late to file a counter-claim; and that the complaint stated in the counter-claim is not one of which a court of equity will take cognizance. Upon a hearing, the court entered an order on May 10, 1939, striking paragraphs 2 to 5, both inclusive, of the counter-claim of said Anna Boddiker, all of said paragraphs relating to the allegations made concerning the trust deed and paragraph 24 of said counter-claim. Paragraphs 1 and 6 of the counter-claim relating only to an accounting to be filed by the plaintiff were allowed to stand.

Upon a hearing of the petition of the plaintiff and the answer of Anna Boddiker, the court found that the State Mutual Life Assurance has or claims to have some interest in the property involved herein by reason of the payment of \$5,868.87 made by said company on account of taxes on said property, which interest was found in the decree entered herein to be inferior to the lien of the first mortgage bondholders, but that said insurance company filed a petition to vacate said decree, which petition is still pending; that in spite of the finding in said decree, that it is wise and advisable for the trustee to make a settlement with said insurance company, in order that his title be perfected, and to avoid further litigation; that said company has agreed to settle all claims for one-half of the moneys inadvertently paid by it on account of taxes on said property; that said settlement is fair and beneficial to the trust herein, and that the court should approve same, that costs and fees incurred in the foreclosure remain unpaid together with taxes and that it is to

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the best interest of the trust estate if the proposed settlement is made and taxes and foreclosure costs and expenses were paid now, so that further interest will not accrue on the same; that in order to settle the claim of said insurance company and pay the taxes, costs and fees incurred in the foreclosure proceeding, and miscellaneous expenses, it will be necessary to obtain a loan on the property involved herein in the amount of \$10,500, and that the trustee should be given leave to make such a mortgage; that on or about January 19, 1939, the trustee sent out a letter to all the beneficiaries under the trust, informing them of the proposed settlement with said insurance company, and of his intention of mortgaging the trust property, and asking such beneficiaries to file objections to such proposals within fifteen days in the event they objected to either of said proposals, and that to date no objections to either of said proposals have been filed with the trustee or his attorney.

The court by its order thereupon granted the plaintiff leave (a) to make the proposed settlement with said insurance company, and (b) to mortgage the trust property to the extent of \$10,500, with interest at 5% per annum, and to pay all reasonable charges in connection with the making of the mortgage. Anna Boddiker, as defendant and counter-claimant objected to the entry of said order. The defendant and counter-claimant is now prosecuting this appeal from the orders entered May 10, 1939.

It appears from the statement of counsel for defendant that there is no dispute as to the facts, and that only questions of law are involved.

The first contention offered by the appellant is that the bondholders were not parties to the foreclosure suit, and therefore the findings of paragraph 24 of said decree granting the plaintiff the power to mortgage or pledge the premises herein involved, are



not res adjudicata or binding upon the bondholders, and appellant contends that it was conceded on the hearing of this cause that no power is given in the trust deed to mortgage the premises.

The answer of the plaintiff successor in trust to this contention is that it is immaterial whether or not the bondholders were parties to the original foreclosure proceeding, since they are now before the court, because a court of equity will not do the useless act of striking the power to mortgage granted in the decree of foreclosure and later grant the power to mortgage pursuant to present petition of the trustee.

It appears that in the petition here before the court that the cross-complainant is properly before it, and in her representative capacity contends that she represents such interests as are necessary for the purpose of the consideration of the questions involved, and therefore if the bondholders have had proper notice of the proceeding in the instant action, the court would have jurisdiction to pass upon the questions involved.

The questions for the court to determine are: (a) Does plaintiff trustee have the right to make a settlement, under the direction of an equity court, with the State Mutual Life Assurance Company, who, it is alleged, paid by mistake general real estate taxes on the plaintiff's property to the extent of \$5,986.87 (not \$5,444.80 as set forth in the plaintiff's petition), which settlement involves reimbursing said insurance company to the extent of about one-half of the sum paid by it; and (b) Has the plaintiff trustee the right to mortgage, under the direction of an equity court, the trust property in order that it can pay said \$3,013.65 and other expenses of the foreclosure proceeding.

Article 16 of the trust deed is called to our attention by the defendant, which is as follows:

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"That, in the event this indenture shall be foreclosed, \* \* \*, if it shall deem for the best interest of all the holders of said bonds so to do, may, in order that no advantage under such foreclosure may be taken by or accrue to any holder of such bonds over any other holders thereof, demand, receive and hold in its own name the certificate issued pursuant to any such decree, and if said premises shall not have been redeemed as provided by law, may at any sale thereof, unless such premises shall be purchased by some other person, persons or corporation for the full amount of the debt, bid for and purchase said premises, either for the full amount evidenced by such certificate, or for any less amount, and demand, receive and hold in its own name, as trustee, the deed issued therefor, all for the equal pro rata benefit of the persons interested in said certificate. \* \* \*

In the event that the trustee shall under the power hereby conferred, bid for and purchase the said premises or any part thereof, it shall be entitled to receipt to the officer making such sale for the full amount of its bid as agent and trustee of the persons interested in said certificate or foreclosure decree ratably for each and all of them after allowing for the costs and expenses of such foreclosure and sale, and for that purpose said trustee is hereby constituted and appointed irrevocably the attorney in fact of each and all of said bondholders."

It is advisable to continue citing the powers granted to the plaintiff as trustee in the premises as follows:

"\* \* \* to sell and convey the same for such price and upon such terms and to such person, persons, or corporation, as to said trustee may seem for the best interest of all persons interested therein, and until said trustee shall so make sale of said premises, it shall be entitled, to enter upon and take possession of and protect, use, operate and manage the same (description of the premises) and after deducting all such charges, costs and expenses of said trust, may from time to time, as it may elect, divide any monies received by it and in its hands remaining ratably among those entitled thereto."

This article further provides that

"Upon the termination of the trust created by this article \* \* \* upon the sale of all the properties held by said trustee hereunder, \* \* \* all the balance of the moneys remaining in the hands of said trustee hereunder shall be by it distributed ratably among those then entitled thereto."

It is earnestly contended by this appellant that the plaintiff acquired title not as the result of a conveyance by the bondholders to the trustee to hold for the benefit of the bondholders upon certain conditions, but title was acquired by virtue of a power of attorney or agency expressly conferred upon the plaintiff by the bondholders. The agency of the plaintiff and the power of attorney

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring.

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is expressly set forth in this Article 16.

However, in discussing the questions that may be involved, it is equally important that the following part of Article 16 be considered by the court:

" \* \* \* and each and all said bondholders hereby agree to pay upon demand his or their proportionate share of the cash payment so required to be made for the costs and expenses of such foreclosure and sale; in default of payment of any such sum to said trustee on demand, said trustee may sue for and recover the same, and the same, if not otherwise repaid, to said trustee, shall constitute a lien upon the interest of any person interested in said certificate who shall have so failed to pay the same, and said trustee may retain the same out of the first moneys realized from said premises or otherwise apportionable hereunder to such person or persons."

So, as we have indicated, it is largely for the court to consider the provisions and the circumstances under which this plaintiff seeks to have the court approve the order as prayed for in the petition. Now upon the question of fact, there does not seem to be any doubt that the insurance company paid the amount that is claimed for taxes upon the property in question, and in passing upon this question, the point is raised as to whether the insurance company was a volunteer in making such payment. If we follow the suggestions as contained in the record, the item was included among other items of the insurance company when it received the tax bills from the clerk of the county, and thereupon it paid the amount, and it does not appear that the payment such as was made could be considered a voluntary one. The rule considered by the court as controlling is stated in the case of Bush v. Carloading & Distributing Co. et al., 210 Ill. App. 399, which is that the rule which prevents the recovery of money voluntarily paid under a mistake as to the law and under a claim of right does not apply to an action by a carrier to recover freight charges refunded by it on interstate shipments under a mistake as to amount of such charges as regulated by the Interstate Commerce Act. In this action of the insurance company to recover moneys used in the

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TABLE I

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TABLE III

TABLE IV

TABLE V

TABLE VI

TABLE VII

TABLE VIII

TABLE IX

TABLE X

TABLE XI

TABLE XII

TABLE XIII

TABLE XIV

TABLE XV

TABLE XVI

TABLE XVII

TABLE XVIII

TABLE XIX

TABLE XX

TABLE XXI

TABLE XXII

TABLE XXIII

TABLE XXIV

TABLE XXV

payment of its taxes it appears there was a mistake of fact as to the amount due for taxes by the insurance company when it received the bill for such taxes, which included the amount in question. We think under the circumstances that there was a proper claim made by the insurance company, and that it was proper for the court in this action to approve the settlement which was offered. The next question is as to whether the court was empowered to direct that a mortgage be executed by the plaintiff to secure this amount, together with other costs of the foreclosure proceeding. It is the general rule that the courts are controlled by the provisions contained in the trust deed, but we think courts of equity have jurisdiction where it is necessary to protect an estate so that the benefit of the property may not be lost ~~xxxxxxxxxxx~~ to the bondholders. This theory is supported by the authorities cited in the case of Stephens v. Collison, 274 Ill. 389. In that case the court while not approving the decree that was entered by the trial court, said:

"where the trustees cannot under the existing circumstances, or any circumstances that can be anticipated, so manage the trust fund as to carry out the plain intentions of its creator, and such circumstances were clearly not within his contemplation or the subject of any direction in the scheme of the trust as formulated and prescribed by him, a case of necessity is presented requiring the intervention of a court of equity, which may direct a change in the management of the trust fund if by such change the manifest intention of the creator of the trust may be carried into effect. (Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11; 55 Atl. Rep. 468.) So in a case where the income of the trust property is insufficient to pay the taxes and the body of the estate is in danger of being lost entirely, the court will order the sale of all or a part of it in order to preserve it as far as possible. (Voris v. Sloan, 68 Ill. 588.) Under the circumstances where the income of the trust property is insufficient to pay taxes, special assessments, etc., without modification of the terms of the trust, the court may and will modify its terms and the use of the property as specified by the creator of the trust and permit farm lands to be platted and sold as town lots. (Johns v. Montgomery, 265 Ill. 21.) In all such cases, however, the main object of the party creating the trust is best subserved by the court's action and the intent of the creator of the trust actually carried out."

And then in the case of Gary v. Gary, 309 Ill. 330, the court in speaking of the trust in question said:

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

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"The power of a court of chancery to modify a trust under the conditions which are shown in this case is firmly established in this State by a series of decisions, some of which are: Curtiss v. Brown, 29 Ill. 361; Hale v. Hale, 146 id. 227; Gavin v. Curtin, 171 id. 640; Benegre v. Walker, 214 id. 113; Roberts v. Roberts, 358 id. 115; Johns v. Montgomery, 365 id. 21. In the first of these cases it is said: 'Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required, and in such cases the court must, as far as may be, occupy the place of the party creating the trust and do with the fund what he would have dictated had he anticipated the emergency.' "

When we come to consider the facts as they appear in the record where litigation may ensue which would subject the trust property to litigation expense and result in a judgment which would make it embarrassing for the bondholders and may jeopardize the assets upon which they depend to apply, in a measure, upon the amount that is due, the court under the circumstances may direct that this trust deed securing the payments of certain moneys shall be executed by the plaintiff. We may say further that while it was the duty of the holders of the securities in this trust deed to pay the expense of litigation as is provided for by the trust deed itself, it does not appear that there has been any offer by the bondholders to aid in the payment of the expense and costs of the foreclosure proceeding so as to in a measure reduce the amount of the mortgage necessary to pay the amount brought about by an adjustment and a settlement of the insurance company's claim; that by reason of such failure, the bondholders are not in a position to complain because of the inclusion in the mortgage of the amount due for costs in the foreclosure proceeding, and we think it was proper for the court to include in the mortgage the amount due for expenses in the foreclosure proceeding.

There is one other question to be considered. It is contended by the defendant and cross-complainant that there is no time fixed

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within which the power of sale granted to the plaintiff shall be exercised, and no time fixed within which distribution shall be made to the bondholders; that the power of sale is thus repugnant to the rule against perpetuities and is void. However, the title to this property is vested in the trustee for the purpose of disposing of the same, that the amount of the sale if approved by court and received shall be proportionately applied to the payment of the several interests secured by this mortgage. As we have indicated, the title vested at the time when the legal estate was conveyed to the trustee. He is empowered of conveying the immediate and absolute fee; there is no suspension of the power of alienation and the question of perpetuities cannot arise.

The plaintiff in this action calls the attention of the court to the case of Hart v. Reymour, 147 Ill. 598, wherein the court cites with approval the following from the case of Robert v. Corning, et al. 83 N. Y. 225:

"The mere creation of a trust does not, ipso facto, suspend the power of alienation. It is only suspended by such trust, where a trust-term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation is in fact postponed by the non-action of the trustee, or in consequence of a discretion reposed in him by the creator of the trust."

Then the court said:

"Where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute estate in fee in possession, there is no suspension of the power of alienation, and no question as to perpetuities can arise."

See also Hettler v. Warner, 243 Ill. 600; Madison v. Larson, 170 Ill. 65.

In Gray's Book on "The Rule Against Perpetuities", at paragraph 332 says:

"An interest is not obnoxious to the Rule against Perpetuities if it begins within lives in being and 21 years, although it may end beyond them."

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and says further in paragraph 234:

"Although the doctrine that an estate is not too remote if it begins within the limits prescribed by the Rule against Perpetuities is recognized on both sides of the Atlantic, and although an opposite view would conflict with the fundamental principles which govern question of remoteness, yet there are some American cases which are not conformable to this doctrine."

It would seem as suggested by the plaintiff that the general rule is that where power is given the trustee to sell, convey and dispose of the trust estate when the trustee should deem a sale expedient, the proceeds to be divided by the trustee, and where it is a duty to be performed by the trustee or when he is to exercise discretion in the management of the estate, an active trust is created, and partition will not lie, and the power of sale is good. Buckner v. Carr, 302 Ill. 378.

48 Corpus Juris, page 980 says:

"Although it is a general rule that a power is void if it may possibly be exercised at a time beyond the limits prescribed by the rule against perpetuities, a power to sell property, although unlimited as to time, is ordinarily considered not obnoxious to the rule, inasmuch as it must, unless otherwise provided, or otherwise required by the nature of the purposes for which it is created, be exercised within a reasonable time, and a reasonable time is ordinarily less than the period specified in the rule."

Tiffany on "Real Property" 1913, Par. 394, says:

"4. Powers given to a trustee to sell or lease lands are not invalid merely because it is not expressly provided that they shall be exercised within a life or lives in being and twenty-one years thereafter. Such powers, in the absence of an express showing of an intention to the contrary, cease, according to the English decision, either upon the termination of the trust or when the ultimate legal owner is entitled to call for a conveyance of the legal title.."

When we come to consider this question, we have a case where the trustee is in possession and has title for the purpose of sale to apply the amount received on a claim of the several bondholders secured by this mortgage, and under the trust involved in the litigation we are not convinced that this title which is held by the trustee is subject to the rule against perpetuities.

For the reasons stated in this opinion we believe that the court did not err in entering the orders of May 10, 1939, that were appealed from by Anna Boddiker, a defendant and cross-complainant.

ORDERS AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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IN THE MATTER OF THE ESTATE OF J. T.  
WILSON, Deceased.

J. GRAY LUCAS, Administrator de bonis  
non of the estate of J. T. Wilson,  
Deceased,

(Plaintiff) Appellee,

v.

FRANK O. SMITH, Executor of the Estate  
of HATTIE O. WILSON, Deceased,

(Defendant) Appellant.

IN THE CIRCUIT COURT OF COOK COUNTY

CHANCERY.

303 E.A. 655

MR. JUSTICE HENRY WILLIAMS, Circuit Judge of the Circuit Court of Cook County.

The plaintiff, J. Gray Lucas, as administrator de bonis non with the will annexed of the estate of J. T. Wilson, deceased, on October 10, 1936, filed a petition in the Probate Court of Cook County, Illinois, against Frank O. Smith, as executor of the estate of Hattie O. Wilson, deceased, and others, for the purpose of charging the estate of Hattie O. Wilson with the sum of \$7500, the proceeds from the sale of certain stock which the petition alleged that Hattie O. Wilson, while executrix of the Estate of J. T. Wilson, deceased, took out of the estate and sold, and the petition further seeks to reclaim 195 shares of stock that the petition alleged the said Hattie O. Wilson, while executrix of the Estate of J. T. Wilson, deceased, took out of the Estate of J. T. Wilson, deceased, and transferred to her own name.

On April 30, 1937, the Probate Court denied the prayer of the petition and an appeal was perfected by the plaintiff to the Circuit Court of Cook County, Illinois. The plaintiff filed an Amended Petition in the Circuit Court and the Circuit Court entered an order which granted the relief prayed for. This appeal on behalf of Frank O. Smith, as executor of the Estate of Hattie O. Wilson, deceased, seeks a reversal of that finding and order.

The facts that appear from the evidence are: that Hattie O.

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The facts that appear from the evidence are as follows:

Wilson was the executrix and sole legatee of the estate of her husband, J. T. Wilson, which test to her ending in the Probate Court of Cook County, Illinois. On September 4, 1936, Hattie C. Wilson died and Frank G. Smith was named as executor of her will, which was admitted to probate by the Probate Court of Cook County, Illinois. The plaintiff, J. Gray Lucas, had been the attorney for Hattie C. Wilson, while she was acting as executrix of the estate of J. T. Wilson, and upon her death the plaintiff was appointed Administrator de bonis non with the will annexed of the estate of J. T. Wilson, deceased.

The plaintiff filed a petition on October 3, 1936, in the Probate Court of Cook County, Illinois, alleging that Hattie C. Wilson, the widow of J. T. Wilson was the sole legatee and the executrix of her late husband's estate until her death on September 4, 1936; that on September 28, 1936, she inventoried as an asset of the estate 390 shares of stock in the Universal Life Insurance Company; that she caused the stock to be transferred on the books of the Insurance Company to her as an individual; that she later sold 195 shares of this stock for \$7500 and that upon her death she left a last will and testament in which she bequeathed the balance of the stock to one Traville Holmes. The petitioner sought to collect \$7500 which Hattie C. Wilson received for the 195 shares of the stock from her estate and claimed ownership of the remaining 195 shares of stock. Frank G. Smith, the executor of the estate of Hattie C. Wilson, filed an answer to the petition in which he denied the material allegations of the petition and denied that the petitioner was entitled to any of the relief prayed for.

On April 30, 1937, the Probate Court of Cook County, Illinois, entered an order finding that the petitioner was not entitled to the sum of \$7500 which Hattie C. Wilson received from the sale of



the 135 shares of the stock and that the petitioner was not entitled to the remaining 135 shares of the stock. From the entry of this order, the petitioner perfected an appeal to the Circuit Court of Cook County, Illinois. In the Circuit Court the petitioner filed an amended petition. In this amended petition it was alleged that Mattie C. Wilson was the sole legatee in the will and acted as executrix of the estate until her death on September 4, 1936; that on September 28, 1932, she inventoried as an asset of the estate of J. T. Wilson 390 shares of stock of the Universal Life Insurance Company; that she sold 135 shares of this stock for \$7500 and did not deposit the money in her account as executrix. It was further alleged that subsequent to the filing of the original petition the certificates for 135 shares of said stock were delivered to the petitioner by an order of the Probate Court and sold for \$7000, and that no appeal was taken from said order; that the Probate Court entered an order on April 30, 1937, that the petitioner was not entitled to recover from the estate of Mattie C. Wilson the sum of \$7500 and that the stock in the Universal Life Insurance Company was the property of Mattie C. Wilson and not a part of the estate of J. T. Wilson. The petitioner prayed that an order be entered finding that the 390 shares of stock in the Universal Life Insurance Company in the possession of Mattie C. Wilson were the property of J. T. Wilson and are a part of the assets of his estate and that the order of the Probate Court of April 30, 1937, be vacated and that the amended inventory filed on September 28, 1932 be found to be true and correct.

The Circuit Court of Cook County, after a hearing, entered an order finding that Mattie C. Wilson, as executrix of the estate of J. T. Wilson, deceased, had inventoried as property of J. T. Wilson 390 shares of stock in the Universal Life Insurance Company; that





after the death of J. T. Wilson, she sold 195 shares of the stock, and the remaining 195 shares of the stock were sold by J. Gray Lucas, Administrator de bonis non of the estate of J. T. Wilson, deceased, by an order of the Probate Court for \$7,000 on January 26, 1937; that 390 shares of the common stock of the Universal Life Insurance Company issued in the name of J. T. Wilson were on the date of his death his property and not the property of Hattie C. Wilson, and that the sum of \$7,000 received by the petitioner as the proceeds of the sale of 195 shares of said stock is the property of the estate of J. T. Wilson, deceased.

It is the contention of the defendant in this action that the order and findings are contrary to law, and he calls our attention to the fact that the petitioner in this action is the Administrator de bonis non and that Hattie C. Wilson, the prior sole executrix had filed an Amended Inventory in 1933, in which she listed 390 shares of stock in the Universal Life Insurance Company of Memphis, Tennessee; that in 1935, she caused all of said stock to be transferred on the books of the Company to her name individually, had sold one-half of said stock and bequeathed the other one-half by her last will. Defendant then calls our attention to Section 37, Ch. 3, Par. 38 Ill. Rev. Stats. 1933, which provides that where a sole executor dies without having fully administered the estate, the court may appoint an administrator to administer the estate not already administered and such subsequent administrator may maintain proper action on the securities of such former executor for the goods, chattels, debts and credits that are withheld or may have been wasted, embezzled or misapplied.

The action we have before us is one to recover from the estate of Hattie C. Wilson, since deceased, the stock in question which was withheld by her as executrix of her late husband's estate. The rule applicable is: where it is claimed that a representative of



an estate has property belonging to the estate which is claimed by such representative individually, the Probate Court has ample authority to determine the ownership of the property and it is not necessary that separate suits be brought. Julson v. Lillycock, 205 Ill. App. 366. The court in its opinion said:

"Where it is claimed that the representative of an estate has property belonging to the estate, which is claimed by such representative individually, the Probate Court has ample authority to determine the ownership of the property, and it is not necessary that a separate suit be brought. Martin v. Martin, 170 Ill. 18; Cinamoor v. Kressler, 164 Ill. 311; Platt v. Williams, 175 Ill. App. 1; Rone v. Robinson, 188 Ill. App. 438."

So it will be seen that the court was within its jurisdiction when it passed upon the ownership of the stock in question and entered the order which was entered by the court.

It is further called to our attention that the stock of Hattie C. Wilson was not identified by the evidence of witnesses who were familiar with her signature. However, upon an examination of the record we find that the court in permitting these exhibits to appear in this record heard the testimony of Charles Case, who testified that he was familiar with the signature of Hattie C. Wilson and that Exhibits 1, 2 and 3 bore the signature of Hattie C. Wilson. Such is the evidence that appears in the record, from which we conclude that the court had evidence before it which would justify the exhibits being offered in evidence. The objection also was made that these exhibits were produced by the Administrator de bonis non, who was in the lifetime of Hattie C. Wilson her attorney, and for that reason they were incompetent. The fact is that these exhibits are inventories, as appears from the face of the exhibits, in which the former executrix, Hattie C. Wilson, signed and admitted that the stock in question was the property of her husband in his lifetime, and these being documents provided for by law it would seem that they would not be incompetent because they were in the possession of Hattie C. Wilson's former attorney.

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The other question to be considered is whether the court erred in allowing the petitioner to file an amended petition, who points to the law that the trial was de novo and must be based upon the petition heard when the questions were decided in the Probate Court. The fact in this case however is that after the objections were offered by the petitioner on the ground stated, they were overruled by the court, and subsequently, on April 11, 1939, on the motion of the defendant, the court entered an order allowing the answer of the defendant to the original petition to stand as an answer of the defendant to the amended petition, and it is suggested that the defendant waived his objection to the filing of the amended petition when he answered the amended petition after his motion to dismiss was denied and the cause went to trial on the merits. The general rule applies, and it is suggested that the defendant by filing his answer waived his grounds, as above stated, and cannot urge the same objections to the petition after the trial on the merits. This rule was followed in the case of The People v. Board of Supervisors, 171 Ill. App. 48.

The order of the court entered in this case is supported by the evidence as heard, and from this evidence it appears that the stock in question was the property of J. C. Wilson in his lifetime. This is amply supported by the inventories of Mattie C. Wilson, his wife, who inventoried the property as being that of J. C. Wilson, deceased, at the time of his death. Therefore, the court was justified in entering the decretal order such as was entered in this action. For the reasons stated, the order is affirmed.

DECRETAL ORDER AFFIRMED.

DENIS E. SULLIVAN, P. J. AND BURKE, J. CONCUR.

DEWIS F. GUNN, JR., 1000

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J. WEIDLER & SONS,

(Plaintiff) Appellant,

v.

MUNGER'S LAUNDRY COMPANY, a corporation,

(Defendant) Appellee.

APPEAL FROM

APPELLATE COURT

OF THE DISTRICT OF COLUMBIA.

MR. JUSTICE HENRY H. HARRIS, Chief Justice.

This is an action by the plaintiff in which judgment by confession for \$2,497.50 was entered under the terms and provisions of a lease signed by the defendant, and upon the defendant's several motions the court subsequently granted leave to the defendant to appear and defend. A trial was had before the court, and the court made a finding that \$400 was due the plaintiff from the defendant, and entered judgment on that finding. This appeal is by the plaintiff from the judgment entered by the court upon the trial.

The pleadings consist of the statement of claim filed by the plaintiff, together with affidavit and cognovit, and the verified petition of the defendant. This petition stands as defendant's answer.

The statement of claim alleges that rent is due the plaintiff under its lease to the defendant providing for \$300.00 a month, in the sum of \$300.00 a month for two months, and \$100.00 a month for seventeen months, or a total of \$3,300. The plaintiff seeks judgment for \$2,300, plus \$197.50 for attorney's fees, a total of \$2,497.50 and costs. Defendant's petition sets forth as its defense that the plaintiff and the defendant entered into an oral agreement to reduce the rent to the end of the lease from \$300.00 a month to \$200.00 a month, and that the defendant paid that amount to the plaintiff to the expiration date of the lease, and therefore is not indebted to the plaintiff.

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The stipulation entered into between the respective parties in this cause set forth that no rent was paid for the months of April and July, 1932, as reduced to \$300 per month, or \$400. The stipulation further provided that the question of whether or not any rent was due other than \$400 after August, 1932, was dependent upon the court's findings as to the facts, namely, whether or not the rent had been reduced from \$300 to \$200 per month, and if the rent had not been reduced to \$200 per month, then it was stipulated and agreed that there would be due and owing the plaintiff \$100 per month from September, 1932, until the expiration of the lease, plus the previous rental of \$400 which was unpaid. It was further agreed that in the event there should be a judgment for the plaintiff, credit was to be given for the amount that had been paid since the date of the judgment.

Plaintiff's claim is for unpaid rent on a written lease under seal providing for a rental of \$300 per month from May 1, 1930, to April 30, 1934. It is not disputed that two months rent, amounting to \$600 was not paid. It is also not disputed that rent in the amount of \$200 per month, instead of \$300 per month, as provided in the lease, was paid for seventeen months.

The defendant contends that the plaintiff in April, 1932, entered into an oral agreement to reduce the rent for the premises from \$300 per month to \$200 per month to the end of the lease. The plaintiff, however, denied that he ever entered into such an agreement, and asserted that the only agreement for reduction of rent he ever made was for four months, from April, 1932, to and including July, 1932.

It is admitted by the defendant that the admission of the lease in evidence, offered by the plaintiff, made out a prima facie case in favor of the plaintiff and it is also admitted that upon

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the receipt of the lease in evidence the burden of proof then shifted to the defendant to establish by competent evidence that said lease had been modified by an oral agreement entered into on or about the month of April, 1937, whereby the rental of the premises was reduced from \$300 per month to \$200 per month to the end of the lease.

In support of its defense, the defendant introduced two witnesses: its president, Mr. Andrew Tilley, and its treasurer, Mr. John Leas. Their testimony was that they had both been associated with the defendant since 1938, and in April, 1937, they went to see the plaintiff at his office, and asked him for reduction in the rent, and from the evidence it appears that they testified "we told Mr. Camp we would have to have a reduction in our rent; that we couldn't pay it"; that the plaintiff, Mr. Camp, at that time said: "I'll reduce the rent \$100.00 a month to the end of the lease"; that they never saw the plaintiff thereafter, and did not see him on Washington Boulevard; that the only letter or communication they ever received from the plaintiff after April, 1937, was a letter dated May 1, 1936, marked Plaintiff's exhibit 1, reducing the rent after May 1, 1936, from \$300 to \$150. It further appears from the testimony of Mr. Tilley that he at no time saw the plaintiff, or had any further negotiations with him or received any demands from him up until the time the judgment was entered by confession in 1937. The testimony further shows that his company continued to occupy the premises after the expiration of the lease from April 30, 1934, up until the time the judgment was entered on August 30, 1937, and that after the expiration of the lease his company paid as rent for said premises the sum of \$300 a month up to May 1, 1936 and \$150 per month thereafter.

The testimony of both Mr. Tilley and Mr. Leas is to the effect that they at no time received any registered letter from the

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plaintiff dated April 25, 1934, nor the letter dated August 16, 1932, and it is further denied by each of them that copies of 21 rent statements, marked Plaintiff's Exhibit 6, which were dated monthly from September 1, 1932 to April 30, 1934, showing the balance of rent due, were ever received by them. The plaintiff offered in evidence the testimony of three witnesses, the original lease, notice to produce, carbon copies of two letters, dated August 16, 1932, and April 25, 1934, and twenty-one monthly rent bills or statements, dated from September 1, 1932, to May 1, 1934, all having been addressed to the defendant. The lease, twenty-one rent bills or statements and the two letters were admitted in evidence and are part of the record. Mr. Camp testified that the only person he saw in April 1932, concerning the rent, was Mr. Tilley, whom he saw on April 4, and April 15, and that he granted Mr. Tilley a reduction in rent from \$300 a month to \$200 per month, for four months only, April, 1932 to July, 1932. He further testified that only once did he see Mr. Tilley and Mr. Laas together, and that was on Washington Street, on the 25th of July, 1932; that he saw Mr. Laas on August 10, 1932, at Mr. Camp's office on Washington Boulevard; that he saw Mr. Laas about November 15, 1932, at the office of Manger's laundry, and that he went there to ask for the rent that was due, and was told by Mr. Laas, "You can't get anything here. We are not afraid of any legal pressure."

It was further testified by Mr. Camp that he called the defendant on the telephone, that he wrote the defendant letters, that he billed the defendant, and, particularly, that he wrote the defendant a letter dated August 16, 1932, asking for payment of the July rent, and offering to extend the reduction of rent of four months from \$300 to \$200 per month to include August and September,

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1932, if the July rent were paid within a week; that he wrote the defendant a letter dated April 10, 1934, asking for payment of back rent, in the amount of \$1,470; that he has twenty-one rent bills or statements which were sent to the defendant by his bookkeeper monthly, from September 1, 1932, to May 1, 1934, showing the balances due for rent monthly being \$70 on September 1, 1932, and \$75.00 on May 1, 1934, an increase of 100 per month successively in the amount due.

Evidence was offered of a witness for the plaintiff, Mrs. Ruth Camp, that she typed the original of the letter dated August 16, 1932, which asked for July rent, and offered to extend the reduction for four months, carbon copy of which, marked Plaintiff's exhibit 4, was admitted in evidence, and that after Mr. Camp signed it, she deposited the letter in a U. S. mail box, properly addressed and addressed to Manger's Laundry, that it never came back, and that she remembered that letter because she was familiar with her husband's business and knew it was an important letter, and had discussed it with her husband.

There was further evidence by Mr. Larson who testified that she was the bookkeeper for the plaintiff; that she typed the registered letter dated April 25, 1934, carbon copies of which were admitted in evidence, and that after Mr. Camp signed it, she mailed it and that it never came back. She further testified that she prepared and mailed to the defendant twenty-one monthly bills or rent statements at successive months, carbon copies of which were admitted in evidence. These were dated from September 1, 1932 to May 1, 1934, each showing the balance due on the rent.

It does appear from the evidence that the defendant paid the plaintiff on and after the month of April 1932, the sum of

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\$200 per month up until the time the lease expired on April 30, 1934 with the exception of two months, and that the defendant remained in possession of the premises and continued to pay the sum of \$200 per month up until May 1, 1936, at which time the plaintiff notified the defendant by letter dated May 1, 1936, marked and received in evidence as Plaintiff's Exhibit 1, that the rental on and after May 1, 1936, would be \$150 per month, which said amount was paid promptly by the defendant and accepted by the plaintiff.

The questions of fact in this case are sharply controverted and it was for the court to pass upon the question as to whether the lease was modified, as appears from the testimony of witnesses for the plaintiff, and also as to the question of the evidence offered by the plaintiff, in which the evidence of Mr. Leap for the plaintiff sharply denies that he ever entered into an agreement with the defendant for reduction of the rent; also whether the lease as well as the statements of rent claimed to have been mailed each month, succeeded the time when the rent was reduced, as testified to by defendant's witnesses. It was for the court to pass upon the credibility of the witnesses, as well as the weight of the evidence, and it is the contention of the plaintiff that the judgment of the court is against the manifest weight of the evidence; that it follows from the reception of the letters and the statements by the defendant that there was no agreement for reduction of rent after August 1, 1932, and that the finding of the trial court to that effect was erroneous.

The reply of the defendant is that the finding of the trial court was not against the weight of the evidence, and that the judgment based thereon should not be disturbed unless the reviewing court can say from reading the record that the finding is clearly and manifestly against the evidence.



A vital question is whether the covenants of an instrument under seal can be modified by an oral agreement entered into between the parties. A number of authorities have been cited by the parties to this litigation, one of which is the case of Pecker v. Pecker, 350 Ill. 117, where the court said:

" \* \* \* there is a well defined distinction between a parol contract which adds to or modifies the terms of an executory written contract under seal, and a parol agreement made by the parties by which some of the covenants in such written contract are waived by the party for whose benefit such covenant was inserted. Where a party to such written instrument by some affirmative action on his part induces the opposite party to believe that the strict performance of a covenant will not be insisted upon or that the same will be waived, and such other party fails to perform the covenant through the influence or request of the covenantor, in equity such party will be estopped to insist that the written contract is no longer obligatory upon him because of the non-performance of such covenant. A waiver, of a covenant by the party for whose benefit it is inserted into a written instrument may be made by parol, and such waiver is held not to be a modification or change in the terms of the original agreement."

And again in Correll et al. v. Grayth, 141 Ill. 22, the court said:

"An executed parol agreement may be shown to defeat a recovery upon an instrument under seal. If the new parol agreement, even though it be without consideration, has been executed, and, by means thereof, one of the parties thereto has been led into a line of conduct which must be prejudicial to his interests, an equitable estoppel arises in his favor."

Upon a like question, the court in Moss v. Loomis, 156 Ill.

293, said:

"So rights arising under sealed instruments may be waived by parol. Thus, where a lease contains a condition of forfeiture in case the tenant underlets the premises without the written consent of the lessor, if, after such condition is broken, the lessor does any act which is clearly inconsistent with his reliance upon it, such as the acceptance of rent with full knowledge of all the facts, such conduct amounts to a waiver of the condition, so as to preclude the lessor from afterward availing himself of the forfeiture. Goodright v. Davies, Conn. 803; Wood on Landlord and Tenant, 530."

In the case of Snow v. Griesheimer, 220 Ill. 106, it was contended that the court committed error in permitting oral evidence to be introduced showing an agreement to reduce the rent on the theory that an executory contract under seal could not be modified or changed by any agreement not under seal. The court in that case said:

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"The rule of law, however, is one that rests on the intention of the parties, and while it should be enforced in every case to which it applies, it is not to be extended to other cases to which it does not properly apply. If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed."

In the case of Lavy v. Greenberg, 281 Ill. App. 541, the appellant procured a judgment by confession on a lease and subsequent thereto the defendant filed a petition to have the judgment vacated. The judgment was opened up to allow the introduction of proof and subsequently the case was tried before the court without a jury. As a result, the original judgment was reduced from \$1105. to \$155. It appears that it was stipulated in this case that an oral agreement was entered into between the parties to reduce the rent from \$135 to \$110 per month, which sum was paid by the defendant and accepted by the plaintiff. This court in that case said:

"As indicated by the court in Boyle v. Dunne, 144 Ill. App. 14, the test is not whether there was a consideration for the reduction of the rent, but whether the gift was executed or unexecuted. Applying this test to the facts stipulated herein, it clearly appears that the agreement for the reduced rental was executed by the parties during a large portion of the term and required no consideration. Under the authorities, hereinbefore cited, we are disposed to regard the reductions in rental as gifts of separate and distinct items each month, and when the same were paid and accepted, we believe the gift in each case was complete and irrevocable, as held by the court in Kafka v. Peterson, 357 Ill. App. 525 (Abst.)."

From the facts, as well as the law applicable to the questions involved, it does not appear that the court erred in finding the facts as they appear from the record and in entering judgment for the amount as above stated; nor did the court err in failing to allow attorneys' fees in this case, as suggested by the plaintiff. The record does not disclose that any claim was made by the attorney representing the plaintiff for attorneys' fees and further there is no proof of offer of proof of any kind to show what the services which were rendered were reasonably worth, and of course the court did not err in not allowing attorneys' fees in this case.



From the conclusion reached by the trial court, who heard the evidence without a jury, it does not appear that the decision of the court is manifestly against the weight of the evidence, and this rule is supported by the case of Illinois-Indiana Fair Association v. Phillips, 341 Ill. App. 464; Miller v. Mayberry, 303 Ill. App. 58; Wald v. Lillenthal, 308 Ill. App. 327; Caruthers v. Messer, 134 Ill. App. 370; Hagg v. Hagg, 193 Ill. 645; Hagg v. Killebrew, 209 Ill. 193.

As we have already indicated, the questions of fact were controverted and the trial court saw the witnesses, heard their testimony, passed upon their credibility and entered the judgment that is appealed from. The evidence clearly shows that the lease upon which this suit is predicated, expired on April 30, 1934 and judgment by confession on the lease was not entered until August 30, 1937, which was not until three years and four months after the expiration of the lease, and this was after the defendant had vacated the premises and the plaintiff had accepted the rent during the period the defendant occupied the premises, and during the time of such occupancy the plaintiff, by letter after the lease had expired, reduced the rent for the premises in question to \$150 per month on May 1, 1936, and during the entire period the defendant occupied the premises after May 1, 1936, the sum of 150 was paid each and every month and accepted by the plaintiff.

For the reasons stated, we are of the opinion that the court in entering judgment was sustained by the evidence, and this court is not in a position to say that the finding of the trial court was against the manifest weight of the evidence. Therefore the judgment entered by the court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

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HENRY K. HOLSTADT,

Plaintiff - Respondent,

CAMPBELL TRUST COMPANY,  
Corporation,

Defendant - Appellant.

305 F. 2d 461

MR. JUSTICE HENRY HOLSTADT, Circuit Judge of the Court.

Plaintiff's action is a contract action of the first class in the Municipal Court of Chicago on a written contract for architect's services. Plaintiff's statement of claim alleges that on July 10, 1928, plaintiff, an architect, made a written contract with the defendant, alleged to be a corporation engaged in the real estate business, purchasing, selling, subdividing and trading real estate and constructing buildings on property which it owned or controlled, whereby the plaintiff was to furnish architect's services for the erection of three houses owned or controlled by the defendant in Lake Forest, Illinois, the plaintiff alleging that he had performed all services required by said contract, but the defendant had refused to carry out its part of the contract or to build the houses, and thereby \$3,508.67 became due the plaintiff from the defendant November 1, 1928, a copy of the contract being attached and made part of the statement of claim and is in the form of a letter dated July 10, 1928, addressed to the defendant, signed by the plaintiff, alleging: "I accept your order for plans for the erection of three houses on lots owned by you in Campbell's Lake Forest Addition" (legal description). This letter then provides that the architect's fees should be 10% of the cost of the buildings, service to be rendered and payment therefor to be made as defined in Document 177 attached, "except that services for landscape work, heating, mechanical and electrical

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engineering work will be furnished by me without extra charge, and all trades, except possibly heating, plumbing, electric and landscape work will be let to one general contractor for each house," architect's fees if the work progresses without delay caused intentionally by owner to be 1/3 of basis fee when bids taken, 1/3 when house under roof, 1/3 when house completed and the balance when the house is sold "and/or" delivered to others .

Also specified in the agreement is the sale price of the houses, including commissions on loan, etc., a sales commission of 5% of the sale price to defendant, exclusive agent for selling the property, preliminary sketches, working drawings and specifications to be made subject to the direction and approval of the owner, and appended are the words, "Approved, Campbell Realty Co." Attached is Document 177, being a schedule of charges and details of services of American Institute of Architects, providing for a charge of 6 per cent of the total cost of the work complete and various other details of no importance.

Defendant's statement of defense as it remained after part was stricken by order of court, upon plaintiff's motion, admits that the written document, a copy of which is attached to said statement of claim, was signed and delivered by the parties, but denies that it constitutes a valid contract or a written contract, and denies that the property was owned or controlled by the defendant; alleges that the plaintiff failed to perform certain services and duties required of him to be performed; that the defendant did not fail or refuse to carry out any term or provision required of it to be carried out and did not refuse to build any houses as provided for, but no houses were built for reasons hereinafter mentioned; denies that any money became due the plaintiff; alleges that in making said supposed contract Charles P. Campbell acted on behalf of the defendant; that prior to and at the purported execution

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and delivery of said supposed contract defendant, acting through said Campbell, informed the plaintiff that it would be unable to go ahead with the construction of the buildings referred to in said supposed contract unless it could procure loans of money on the security of said premises sufficient to pay the cost of erecting said buildings, including the fees and charges of the plaintiff, and plaintiff then and there stated to the defendant and said Campbell that the plaintiff so understood the matter and that such was the purport of the contract between the plaintiff and the defendant without encumbering said contract with any further specific recital of such matters; that said understanding and belief was induced and created by the statement made by the plaintiff and was, at the time of the supposed execution and delivery, known to the plaintiff to be had by the defendant and said Campbell.

Omitting part of the statement contained in the affidavit of defense, the defendant then states that said supposed written contract also is alleged to have been executed and delivered solely on condition that the defendant would be able to procure loans on the security of said premises sufficient to pay the expenses of the erection of said buildings, together with the fees and charges of the plaintiff, and that in case of inability to procure such loans the defendant was to be liable to the plaintiff only for 1/3 of the basic fee mentioned in said supposed contract.

Upon the pleadings we have outlined the court proceeded to a hearing, and it appears that after the evidence was heard and motions made by the defendant at the close of the plaintiff's evidence, as well as at the close of the case, to instruct the jury to find for the defendant, which motions were denied, the jury retired and found for the plaintiff and assessed his damages at \$3506.67, upon which finding judgment was entered, and it is from this judgment that the defendant appeals to this court.

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In the instant case the plaintiff took direct appeal to the Supreme Court, and upon consideration of whether there was a question involved that would justify direct appeal, the Supreme Court in its opinion on this question said:

"Before this court has jurisdiction on direct appeal the record must affirmatively disclose that the constitutional question was not only presented in the trial court for decision but was passed upon by it."

and transferred the case to this court to consider the questions involved other than a constitutional one.

The first error that the defendant calls to our attention is that the court erred in striking from the defendant's pleading the defense of ultra vires, and points to the evidence that the defendant is an agency and loan corporation and had no right to deal in real estate on its own account and improve the land by erecting buildings thereon, and then sell the land thus improved. That is what its contract with the plaintiff necessarily involved, and further contends that the transaction was ultra vires in the strict sense, involving a lack of corporate power as distinguished from a mere excess use of a power possessed.

The answer of the plaintiff to this question is that the trial court was not in error in ruling, as a matter of law, that since a corporation organized under the Corporation Act of 1913 had a right to hold and sell real estate, the contract with the plaintiff in the instant case was not ultra vires of corporate power, and points to Ch. 32, Section 6, sub-paragraph (b) of Hurd's Ill. Rev. Stats. 1919, which provides that a corporation has the right:

"(5) To acquire and own, possess and enjoy so much real and personal property as may be necessary for the transaction of business of such corporation, and to lease, mortgage, pledge, sell, convey or transfer the same."

The general rule applicable to the defense of the question involved in this litigation is that a corporation has power to acquire real estate for the purposes of its business, and if in

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sector v. Hartford Deposit Co., 130 Ill. 380. In that case the court said:

"We think it has never been held in this state, or understood to be the law, that the question whether such power has been abused could be raised and availed of in defense in a proceeding wholly collateral to the question of the right and power of the corporation in the premises. The earlier decisions of this court are to the effect that a corporation having general power to own real estate for corporate purposes and to acquire real estate in collecting debts due to it, may be required to answer to the state, and to the public only, for an alleged usurpation of power in the respect of the ownership and enjoyment of landed property. (Williams v. Bank of Illinois, 1 Ill. 667; Baker v. Admr. of Hookus, 32 Ill. 79; People v. Trustees of Schools, 111 id. 171; Rice v. Rock Island Railroad Co., 21 id. 93.) In later cases, notably National Stone Building and Loan Ass. v. Savings Bank, 181 Ill. 35, and East River Co. v. Klassen, 185 id. 37, the defense of ultra vires has been allowed to be collaterally maintained in cases where the ultra vires act of the corporation was wholly beyond and outside the general scope of its corporate powers, express or implied, and entirely foreign to the objects and purposes of its creation, - something which, under any and all circumstances, was beyond its power, either as expressed in the grant or as possessed by necessary implication."

Of course in the instant case the corporation could acquire, own and possess real estate necessary for the transaction of its business and take real estate in satisfaction of any liability or indebtedness and could sell the same. One of the implied powers that was suggested by the plaintiff in this action would be to build on the same for the purpose of selling, and the Holzman contract shows that the houses to be erected were to be sold, and he contends that holding the defendant as the owner of the property because it says in the contract that it is the owner, it could make a contract for building houses on its premises and the contract would neither be illegal nor subject to the plea of ultra vires.

The general rule that the State of Illinois alone can raise this question has been approved in the case of Wolff v. Schwill & Co., 351 Ill. 28; State-Washington Stores Co. v. Walgreen Co., 372 Ill.



App. 383; Bartee Tie Co. v. Jackson, 281 Ill. 452.

There are authorities which approve the doctrine that where a contract has been performed by the plaintiff and the defendant has received the benefit of the same the defendant cannot defend on the ground of ultra vires, unless the enforcement of the contract is directly prohibited by some positive rule of law or runs counter to established public policy. Prudential Ins. Co. v. Michan, 364 Ill. 234.

The same question was passed upon by this court in the case of Royal Drug Co. Inc. v. Levin, 273 Ill. App. 331, where this court said, quoting from the case of Jensen Lumber Co. v. Thornton, 185 Minn. 230:

"Contracts should not be held ultra vires unless clearly shown so to be.

The present tendency is to restrict the defense of ultra vires in actions between private parties as far as possible, if not to deny it altogether, except in the case of contracts wholly executory. The general rule is that such contracts are unenforceable when wholly executory, but when executed on one side they are enforceable because the public policy of justice overbalances the public policy of keeping the corporation within the limits of its charter."

And what was said by this court in that case applies to the question involved in the instant case. It appears from the facts that the defendant contracted with the plaintiff to the effect that the defendant company owned the premises and entered into an agreement in which the plaintiff performed the services required of him under the terms of the contract, and upon that question it would seem to be unfair that the defendant could defeat this contract by suggesting the defense of ultra vires because, as is contended, the contract was beyond the power of the corporation to make. See also Carter v. Cairo, Vincennes and Chicago Ry. Co., 240 Ill. 152.

It is further contended by the defendant that the court erred in refusing the defendant's peremptory instruction to find the defendant not guilty at the close of all the evidence. It is

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also contended that the present suit was instituted more than five years after the plaintiff's cause of action had accrued and is barred by the five year Statute of Limitations applying to oral contracts; that the contract cannot in any event be construed as other than partly written and partly oral, and therefore, in law, a mere oral contract, and points to the evidence that the only writing of a contractual nature is a letter from the plaintiff to the defendant, saying: "I accept your order for plans for erection of three houses", and to this letter is appended "Accepted", followed by the defendant's signature. It is further contended that the "order" there referred to was not in writing and the transaction on its face was thus no more than an oral offer, accepting in writing, which did not contain any statement of the subject matter of the order sufficient for the ascertainment of the complete terms of the contract without reference to the oral offer or "order".

The action is based upon this form of agreement. It is addressed to the defendant and says:

"I accept your order for plans for erection of three houses, one on each of Lots 15 and 10, owned by you in Campbell's Lake Forest Addition, on the following conditions: Work will progress diligently and simultaneously on all three houses. I will render complete architectural services for 10% of cost of buildings. Services and payments shall be as defined by Details of Services and Schedule of Charges of American Institute of Architects Document 177, copy herewith attached, except that services for landscape work and heating, mechanical and electrical engineering work will be furnished by me without extra charge and all trades except possibly heating, plumbing, electric and landscape work will be let to one general contractor for each house and each house will have a contract separate from every other house, and except that if work progresses without delay caused intentionally by owner payment for my services on each house will be as follows: 1/9 of basic fee when bids are taken, 1/9 when house is under roof, 1/9 when house is completed and balance when house is sold 'and/or' delivered to others. It is understood that sale price of each house will not exceed value of lot, plus cost of house, plus defendant's pro rata share of architect's fees and carrying charges, such as commissions on loan, taxes and special assessments until sold, and all carrying charges of interest on funds while building,



plus selling cost not to exceed 5% of cost of house exclusive of lot, plus sales commission to Campbell Realty Company of 5% of sale price of house and lot and Campbell Realty Company shall be exclusive agents for selling said property, and if any house is not sold 'and/or' transferred on or before 23 months after completion of houses, residue of fee not paid shall thereupon become due regardless of any sale or transfer, and if any house remains unsold for one year after completion Campbell Realty Company gives architect option to sell same at price above stipulated, through any real estate broker, for which Campbell Realty Company will pay 2-1/3% commission on sale price. Preliminary sketches, working drawings and specifications will be made subject to direction and approval of owner. In case owner causes delay, postponement or abandonment of work architect's fees shall become due in accordance with and in proportion to terms of Article 8 and 9 of said Document 177, Signed, Harry K. Goleman. Approved, Campbell Realty Co., C. F. Campbell, Pres."

Document 177, attached, American Institute of Architects. Details of Services. Schedule of Charges, Schedule of Proper Minimum charges, provides in part as follows:

"In case the owner for any reason causes delay, postponement or abandonment of the work at any stage, then the Architect's fee shall become due and payable in accordance with and in proportion to the terms of Article 8 and 9 of the Document 177."

"Article 8 - Should the execution of any work designed or specified by the Architect or any part of such work be abandoned or suspended, the Architect is to be paid in accordance with or in proportion to the terms of Article 9 of this Schedule for the service rendered, up to the time of such abandonment or suspension."

"Article 9 - whether the work be executed or whether its execution be suspended or abandoned in part or whole, payments to the Architect on his fee are subject to the provisions of Articles 7 and 8, made as follows:

Upon completion of the preliminary studies, a sum equal to twenty per cent of the basic rate computed upon a reasonable estimated cost.

Upon completion of specifications and general working drawings (exclusive of details) a sum sufficient to increase payments on the fee to sixty per cent of the rate or rates of commissions agreed upon, as influenced by Article 6, computed specifications and drawings, or if bids have been received, then computed upon the lowest bona fide bid or bids."

It is submitted by the plaintiff that there was evidence to go to the jury to the effect that the contract in the instant case was unconditionally delivered and that there were no collateral agreements to the effect that the compensation of the plaintiff depended upon whether or not the defendant secured a loan, and

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from an examination of this contract it does not appear that there was an agreement as contended for by the defendant that the compensation of the plaintiff depended upon whether or not the defendant secured a loan. Upon the signing of the contract in question by the parties, the plaintiff proceeded to prepare the plans and specifications, which were submitted after completion to the defendant, and were accepted in writing by the defendant. The letter addressed to the plaintiff from the defendant dated September 8, 1928, was admitted in evidence and written on the defendant's letterhead and signed by the defendant approving the plans as to the three houses and authorizing the plaintiff to go ahead with them. When we consider all of the evidence in this case, the plaintiff has completed his work, in so far as it was required, and for this work he is entitled to receive compensation.

A further question has been called to our attention by the defendant, and that is that the contract was not in writing but was only partly in writing and partly oral - that is, by agreement, and that the five year Statute of Limitations barred the plaintiff's right of action. However, the contract in this litigation as we have quoted it, is complete in all respects and is signed by the parties to be charged, and being in writing it is subject only to that provision of the Statute of Limitations which provides that after ten years a cause of action will be barred by this statute.

Subsequent to the trial of this litigation the defendant moved for a new trial and as one of the grounds, submitted an affidavit which was signed by the defendant in support of a motion to the effect that it desired to present newly discovered evidence. Upon an examination of the abstracts we are unable to find that the newly discovered evidence has been abstracted, and for that reason we are not in a position to pass upon this question.



The only other question that seems necessary to consider is the question of whether the judgment is excessive. The defendant points to that written portion of the contract that all the plaintiff was to receive for the services thus performed was 1/9 of the basic fee, which would amount to \$49.76. It does not appear that the defendant is urging any objection to the court's instruction to the jury on the question of damages, and having been instructed upon that question and the facts being before the jury, the court properly overruled the motion for a new trial, and we believe under the facts as they appear in this record that the court was fully justified. For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, T.J. AND JAMES J. CONCU.



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HAZEL REESE AND STANDARD DISCOUNT CO.,  
INC., a corporation, Assignee,

(Plaintiffs) Appellants,

v.

GUARANTEE TRUST MUTUAL, a Mutual Benefit  
Association and GUARANTEE TRUST LIFE  
INSURANCE COMPANY, a corporation,

(Defendants) Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

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MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from a judgment for the defendants entered by the court in an action by the plaintiff Hazel Reese, to recover as beneficiary, and Standard Discount Co., Inc., a corporation, as assignee, under a life insurance policy issued by the defendants. The life insurance policy was issued and delivered by the defendant Guarantee Trust Mutual on July 30, 1936, in the sum of \$1,000, wherein, according to the provisions of the policy, Allen Reese was the assured and his wife, Hazel Reese, was the beneficiary. On or about October 7, 1936, the defendant, Guarantee Trust Life Insurance Company, issued its reinsurance contract covering the obligations due under the policy issued by the Guarantee Trust Mutual. The assured died on July 24, 1937, at which time the policy was in full force and effect. On July 27, 1937, Hazel Reese, the beneficiary, executed and delivered to the plaintiff, Standard Discount Company, Inc., an assignment in the sum of \$268.60 from the proceeds due her in the above mentioned policies, which assignment was served upon the defendants on or about the same date. Plaintiffs contend that Allen Reese, the assured, kept, performed and complied with all of the terms and conditions of the policy during his lifetime. It is stipulated that the defendant received notice of death pursuant to the policy provisions, and that all payments of premiums were received by the defendant company.

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The defendants refused to entertain plaintiffs' claim for the proceeds of the policy and defended on the theory that the policy was void due to the fact that the assured signed an application which was fraudulent; that he had various ailments at the time the policy was issued, and had they been aware of the same they would not have issued the policy. From the death certificate the assured died from chronic myocarditis complicated by fractured pelvis. Suit was instituted by the plaintiffs to recover the sum of \$300 and the further sum of \$120 pursuant to the terms of the policy providing for increased financial benefits, a total of \$420.

From the evidence in this case it appears that on July 18, 1937, the assured, Allen Reese, was injured in an automobile accident and was confined in the Cook County Hospital, where he died.

The policy sued upon is known as a non-medical policy. In other words, the insured was not examined by a physician at the time the policy was issued, and the policy contained a provision that the insurance would not take effect unless on the date of the policy the insured was alive and in good health.

The defendants contend that the policy of insurance was originally issued upon application of the assured and in which application in answer to questions therein contained the assured, Allen Reese, represented that he had never been under observation, or had been cared for or treated in any hospital, sanitarium, asylum, or institution; that he represented that he had not been treated by or consulted with physicians during the seven years prior to the application, and that he represented that he was in good health on July 28, 1936.

The answer of the plaintiffs to this contention is that there is no evidence or record in this case that the assured signed any application whatsoever, or that he made representations as to the condition of his health in such application, and while it is true that in the original insurance policy there is a statement that the

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assured was in good health, we have been unable to find from the record, or from anything to which our attention has been called, that an application was signed by the assured in which he made the representations that are charged by the defendants in their brief.

The defendants further charge that from a history claimed to have been taken by the doctors in the Cook County Hospital, he had been suffering from a certain condition for the past seven years. When we come to examine the record, we find that this history of the patient was not admitted in evidence and therefore it will not be considered by this court. We have the evidence of the beneficiary, who testified that at the time of receiving the policy her husband, the deceased, was in good health.

The plaintiff further contends that a hypothetical question was asked of Dr. Edmund Foley which assumed a state of facts which were not predicated nor substantiated by any evidence in the record. The hypothetical question is in part as follows:

"Assuming a colored man, age forty-two years of age, who gives a history of having suffered from a peptic ulcer for a period of seven years with intermittent hemorrhages and black tarry stools and he further gives a history of having been prescribed a form of powder with a diet consisting of milk and cream; assuming further a person with a right hemiplegia, which occurred in 1928, which was progressively becoming better until 1937, who has had a high blood pressure history for a period of time prior to the hemiplegia, that is suffering with paralysis and who gave a history of having a sore on his penis twenty years ago, that is twenty years prior to July 30, 1936, and he gave a history of a high blood pressure, I am of the opinion, on the 30th day of July, 1936 he was not in good health."

From an examination of this statement it appears that the inclusion of this assumption of facts was from the hospital record, which was not admitted in evidence, and not being substantiated by facts such as would justify the asking of such hypothetical question, the court in overruling plaintiffs' objection to the hypothetical question was plainly erroneous.

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Other questions have been called to our attention, but in view of the fact that there will have to be a retrial of the issues it will not be necessary to pass upon them at this time.

For the reasons stated, the judgment entered for the defendants by the court is reversed and the cause is remanded.

REVERSED AND REMANDED.

JENNIS E. SULLIVAN, J.J. AND GEORGE J. CONSUM.

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### III. Unpublished opinions

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